103

THE MARINE MAMMAL PROTECTION ACT
PART III

Y 4.M 53:103-89

The Marine Mammal Protec

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT
AND NATURAL RESOURCES

OF THE

COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

THE CAPTURE AND PUBLIC DISPLAY OF MARINE MAMMALS AND THE DIFFICULTIES FACING MARINE BIOLOGISTS UNDER THE ACT'S CURRENT PROVISIONS

FEBRUARY 10, 1994

Serial No. 103–89

Printed for the use of the Committee on Merchant Marine and Fisheries

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MARINE MAMMAL PROTECTION ACT PART III

THURSDAY, FEBRUARY 10, 1994

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ENVIRONMENTAL AND NATURAL RESOURCES, COMMITTEE ON MERCHANT MARINE AND FISHERIES,

Washington, DC.

The Subcommittee met, pursuant to call, at 10:30, in room 1334, Longworth House Office Building, Hon. Gerry E. Studds [chairman of the Subcommittee] presiding.

Present: Representatives Studds, Hochbrueckner, Pallone, Gilchrest, Reed, Hamburg, Eshoo, Ortiz, Saxton, Cunningham, and Young.

Staff Present: Karen Steuer, Deputy Staff Director; Tod Preston, Professional Staff; Marvadell Zeeb, Staff Assistant; Harry Burroughs, Minority Staff Director; Cynthia Wilkinson, Minority Chief Counsel; Margherita Woods, Minority Staff Assistant; and Rod Moore, Minority Professional Staff.

STATEMENT OF HON. GERRY E. STUDDS, A U.S. REPRESENTATIVE FROM MASSACHUSETTS, AND CHAIRMAN, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

Mr. STUDDS. The Subcommittee will come to order. I think we should announce the reappointment to the 104th Congress of the ranking member of this Committee, the gentleman from Texas. Unfortunately, the other 49 States have elections and—we got another one? Also? No.

This morning, although the issues we are going to cover have not been dealt with at our hearings to date on the reauthorization of the Marine Mammal Protection Act, one of them has been discussed in just about every household that has seen "Free Willy": the capture and public display of marine mammals. In fact, it is this issue that has brought one of our colleagues from Florida here to testify this morning. We were originally scheduled to have two of our colleagues from Florida with us; however, Mr. Bilirakis has called with his apologies, he is ill and unable to attend, but we will indeed enter his testimony into the record. I would like to point out to our colleague from Alaska how impressed we are that we are hearing from two members from his side of the aisle on the need for more consideration for Flipper.

And I also point out that the gentleman, as we will shortly learn, I fear, is armed beyond usual this morning. In the traditional hands-on style of this Committee's hearings, we had intended to bring dolphins into the hearing room this morning as we discussed

this issue, but NMFS denied us a permit, mumbling something about the need to be an educational institution.

We will also hear from a representative from the research community, in fact from my own constituency this morning, about the difficulties facing marine mammal biologists under the Act's current provisions; provisions which, I understand, make it more difficult to photograph a whale than it is to kill one in one's net. By the way, Dr. Tyack, I am not sure it was wise to point out that a research institution in my district consistently broke the law for two years while they rescued whales. What the heck.

I am also pleased that we have with us a representative from the Alaska native community to discuss how to improve the relationship between the agencies and the natives whose lives depend on subsistence uses of marine mammals.

It should be an interesting and productive morning and I am delighted to yield to the ranking member, the gentleman from New Jersey.

Mr. YOUNG. Mr. Chairman, I——

Mr. STUDDS. Rank is relative. I yield it to the ranking member.

STATEMENT OF HON. JIM SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY, AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

Mr. SAXTON. Mr. Chairman, hopefully this hearing can begin to end the controversy surrounding the Marine Mammal Protection Act. We are working closely in a bipartisan fashion to reauthorize the MMPA, hopefully, by the April first deadline.

The issues we face today are contentious. Many on the panel have concerns about whether or not agency overreaching is going to take place, but my concerns stem from the proposed permit regulations that the National Marine Fisheries Service had published in October.

Public policy changes of this magnitude require congressional oversight, and that is one reason we are here. I am pleased the Subcommittee will take some time today to examine the NMFS proposed regulations and address these concerns.

My concerns center on NMFS's intention to require permit holders to post a $10,000 surety bond or to make other arrangements for each and every animal in their care. While the reason for the bond is not entirely unreasonable, to offset costs for caring for animals should the facility cease functioning, I am not convinced that NMFS has the statutory authority under the MMPA to require such a bond.

In addition, under the proposed regulations, it seems that NMFS will have to review extensive and intricate permit applications covering various obligations. These include facility permits, amendments to facility permits, and mandatory 5-year renewals of such permits. With all the agency's increased responsibility, it will require an increase in manpower and, in my view, some additional money. And my question is where will that come from? I am not persuaded that increased administrative expenditures are the best use of our limited marine mammal protection dollars.

Finally and most troubling, the proposed regulations would also set a precedent for industry to pay for government's writing of environmental assessments and environmental impact statements. Such policy would have ramifications beyond MMPA and should be carefully considered before being implemented.

So I look forward, Mr. Chairman, to the many comments and suggestions from the witnesses. Hopefully, we can work together on a final amicable agreement to these and other issues we will surely address during this hearing.

May I ask unanimous consent that the statements of Mr. Fields and Ms. Bentley be placed in the record, Mr. Chairman, before I yield to the rank member. That is my prerogative.

[Statement of Mr. Fields follows:]

STATEMENT OF HON. JACK FIELDS, A U.S. REPRESENTATIVE FROM TEXAS, AND RANKING MINORITY MEMBER, COMMITTEE ON MERCHANT MARINE AND FISHERIES

Mr. Chairman, the Marine Mammal Protection Act (MMPA) was enacted in 1972 for the purpose of ensuring that marine mammals are maintained at, or in some cases restored to, healthy population levels.

The MMPA governs a variety of subjects, including public display, scientific research, subsistence use of marine mammals, and the incidental take of marine mammals during commercial fishing operations. The hearing this morning will focus on the first three issues.

The provisions related to commercial fishing were the subject of two hearings before the Subcommittee last year. Those hearings were time-sensitive because a 5-year exemption from the prohibition on taking marine mammals, which Congress had afforded to the commercial fishing industry, was set to expire. The industry faced a serious crisis back in 1988, and Congress had to find a way to keep them in business while still maintaining the goals of the MMPA. During this 5-year period, the National Marine Fisheries Service collected data on interactions between commercial fisheries and marine mammals, determined the status of marine mammal stocks, and tried to develop a permanent regime governing this specific interaction.

With the adoption of H.R. 3049 last year, we extended the exemption to April 1, 1994, to give the fishing industry and the environmental community time to work out their differences. While this issue has proven to be rather difficult, I understand that both groups are working diligently to resolve the issues in contention.

Today's hearing will concentrate on other important aspects of the MMPA—public display, scientific research, importation of marine mammal products, and subsistence use. We will have the opportunity to examine whether the administrative process can be streamlined to better serve the public display industry without harming marine mammals. We will explore whether existing cooperative management agreements have been successful and whether new agreements should be encouraged and funded. We will look at whether the current permit program administered by the National Marine Fisheries Service is an obstacle to research as some scientists have alleged. We will also analyze the Administration's policies governing the take and display of non-depleted marine mammals for educational or conservation programs.

Finally, Mr. Chairman, the largest group of consumptive users of marine mammals in the United States are Congressman Young's constituents. Their use of marine mammals for food, clothing, shelter, handicrafts, and cultural purposes predates the European settlement of Alaska and continues to this day. I hope that we will listen carefully to the concerns and needs presented by the Alaskan natives today, and I pledge my support to the Congressman for all Alaska to work with the Chairman in trying to resolve this issue.

With that, Mr. Chairman, I welcome our witnesses and look forward to the testimony they will present. Thank you.

[Statement of Ms. Bentley follows:]

STATEMENT OF HON. HELEN DELICH BENTLEY, A U.S. REPRESENTATIVE FROM MARYLAND

Good morning, Mr. Chairman. On behalf of the National Aquarium in Baltimore and other marine mammal parks and aquariums, I would like to thank you for hold-

ing this important hearing today on the reauthorization of the Marine Mammal Protection Act. Because the Marine Mammal Protection Act continues to have such a positive impact on the future of marine mammal education, scientific research, and conservation programs, I wanted to make sure my Committee colleagues were aware of a looming thunderstorm that is about to strike the fundamental purposes and policies of the Marine Mammal Protection Act.

The thunderstorm, of which I speak, is in the form of proposed permit regulations from the National Marine Fisheries Service (NMFS).

Specifically, NMFS would include captive marine mammals in the definition of the term "take". I believe that "take" should be defined as covering only activities "in the wild". Otherwise, NMFS will have jurisdiction from "the wild" to well beyond the fence. This action would have serious consequences to the zoological community's education, scientific and conservation programs in the form of additional bureaucracy which is entirely unnecessary. Further, the current language would empower NMFS to set the standards for the care and maintenance of marine mammals within their jurisdiction. This proposed action is contrary to the Clinton Administration's policy to streamline government agencies.

An example: NMFS would require a facility to first apply for a permit to authorize a specific activity; then prior to the activity, the facility would have to get authorization. Finally, one week from the activity, the facility would have to inform NMFS where, when, and how the activity will be performed—even though NMFS has already been informed of the activity from the original permit application. Not only does this seem to be a redundancy, but an expensive redundancy at that.

Mr. Chairman, I am very proud of the Marine Mammal Protection Act. It has given our country's zoos and aquariums the foundation from which to secure the future of marine mammal research. They have developed productive breeding programs of endangered and threatened species, created education programs used by universities coast to coast, and have assisted in returning hundreds of animals back to the wild.

I look forward to hearing the views of our distinguished panel on this potential crisis. I believe we must reauthorize the Marine Mammal Protection Act without impeding the zoological community's future. Thank you, Mr. Chairman.

[Statement of Mr. Pombo follows]:

STATEMENT OF HON. RICHARD POMBO, A U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. Chairman, thank you for holding today's hearing on the reauthorization of the Marine Mammal Protection Act (MMPA). In 1972, Congress took steps to address the declining marine mammal population by enacting this important legislation.

Today I want to express my concerns about sections of this Act which deal with the public display of marine mammals. It is quite clear, the public display community has been able to educate young and old—people around the world—to the importance of marine mammals in our ecosystem.

Every year, millions of people visit marine life parks, aquariums, and zoos to learn more about marine mammals. Some of those millions of individuals visit Marine World Africa USA. Located in Vallejo, California, close to my congressional district, many of my constituents visit the park for a day of excitement and education. At Marine World individuals have the ability to experience marine mammals in an up-close environment. Individuals walk away knowing a little more about marine mammals and the environment. This is confirmed by a recent Ropers poll that reported that 86% of visitors to zoos and aquariums are more likely to be committed to environmental conservation as a result of their visit.

The education programs in which Marine World has developed provides elementary schools, high schools, and universities an in-depth understanding into all aspects of marine mammals. As you may be aware, the commitment to marine mammals does not end in the classroom. Members of the Alliance of Marine Mammal Parks and Aquariums have spent over $20 million in the past 5 years on research that helps stranded animals as well as wild populations.

As we move through the process of the reauthorization of this bill, Mr. Chairman, I hope that the Merchant Marine and Fisheries Committee can work in a bipartisan manner to reinforce the original intent of this Act and to acknowledge the work the public display community has done over the last 20 years.

Mr. STUDDS. I am sure the ranking members of the majority side will be pleased to allow us to hear from the distinguished member from Alaska.

STATEMENT OF HON. DON YOUNG, A U.S. REPRESENTATIVE FROM ALASKA, AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON FISHERIES MANAGEMENT

Mr. YOUNG. I thank the Chairman and the ranking member for their kindness for recognizing me. Mr. Chairman, I know this hearing is not about fisheries interaction with marine mammals, so I will keep my remarks brief, I know that makes everybody happy. But one of the topics of concern to me today is the effect of the Act on native Alaskans who take marine mammals for subsistence. Our staffs have been working on amendments that will solve some of the problems identified by the native community. However, we must all recognize the bottom line, which is that the right of Alaskan natives to harvest marine mammals for subsistence should not be taken away by Congress, or taken away by any agency.

The other issue we will address today is that of public display of marine mammals. My good friend just talked about that. I thought we had resolved this problem in 1988. Unfortunately, the National Marine Fisheries Services has taken 5 years to produce two hundred pages of regulations that only make the problem worse. The zoos and aquariums of this country perform a valuable role in educating the public on marine mammal problems. They assist stranded marine mammals and nurse them back to health. They work on protecting endangered species.

I want to make clear that I intend to support our nation's zoos and aquariums for letting them continue the good work they have done.

Mr. Chairman, I work very closely with the groups that display these mammals, especially from Alaska who are after the orca whale. I finally won that permit and now after they decided it was unwise to try to capture wild animals, they proceeded to have these animals give birth to new ones within their aquariums. Along comes NMFS, these aren't yours, these are ours. This is government stupidity at the highest degree. And I hope we can look at these regulations and try to express our dissatisfaction on what they are trying to do with units that do protect the marine mammals and provide for the public on an educational basis. This is a classic example that the government cannot do what is correct, I don't think at any one time. Thank you, Mr. Chairman.

Mr. STUDDS. Are there other members who are compelled to make an opening statement——

Mr. ORTIZ. I would just like to include my statement for the record, Mr. Chairman.

Mr. STUDDS. Without objection. Are there others?

[Statement of Mr. Ortiz follows:]

STATEMENT OF HON. SOLOMON P. ORTIZ, A U.S. REPRESENTATIVE FROM TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON OCEANOGRAPHY, GULF OF MEXICO, AND THE OUTER CONTINENTAL SHELF

I want to thank the Chairman for holding this hearing today to examine how the Marine Mammal Protection Act can be reauthorized in a manner that can best ensure the welfare and safety of marine mammals within a regulatory framework that properly represents the legitimate interests of the public display and scientific communities.

Anyone who has had the opportunity to observe a dolphin, sea lion, or manatee in the wild or at a zoo or aquatic park can recognize both their ecological and aesthetic value. Like many of the other members of this Committee, I believe that we

need to do what is necessary to ensure the health and preservation of our marine mammal species for future generations.

The zoological and marine mammal public display community plays an important part in this effort by demonstrating the value of marine mammal species and visibly displaying the close relationship between human behavior and the health of these species. As such, I hope that in the process of drafting a reauthorization of the MMPA, this Committee will support amendments to the Act that will allow responsible institutions to conduct their important display, education, and conservation programs within a sensible and practical regulatory scheme that avoids unnecessary duplicative and overlapping requirements. It is vital that we ensure the proper care and treatment of marine mammals; however, I hope we can do so in a way that will promote the dissemination to the public of information about the value of these species, rather than deter it.

I look forward to hearing from the witnesses today, and, likewise, I look forward to working with the Chairman and the ranking member, Representative Saxton, on the large number of issues that need to be resolved as we work towards the reauthorization of the MMPA.

[Statement of Ms. Schenk follows]:

STATEMENT OF HON. LYNN SCHENK, A U.S. REPRESENTATIVE FROM CALIFORNIA

Thank you, Mr. Chairman. As a member whose district is home to a Sea World facility, I am very interested in the issues raised as this Subcommittee considers the reauthorization of the Marine Mammal Protection Act (MMPA), particularly those aspects of the reauthorization affecting zoological institutions. I appreciate being able to submit this statement for the hearing record.

The MMPA was enacted in 1972 to conserve declining marine mammal populations in the wild from human threats to their continued existence. The Act safeguards marine mammals by managing human activities affecting them and their natural habitat. Sea World and other members of the Alliance of Marine Mammal Parks and Aquariums (Alliance) and of the American Association of Zoological Parks and Aquariums (AZA) continually work toward marine mammal protection in a number of ways including education, research, rescue and rehabilitation, and care and maintenance. The MMPA specifically recognizes the important role that the zoological community plays in educating the public about the importance of marine mammal protection and conservation. Congress should reaffirm this importance as it reauthorizes the MMPA.

The benefits derived from the zoological community's education, research, rescue and rehabilitation, and care and maintenance efforts help to protect marine mammals and their habitat at no expense to the Federal Government. The great service that the zoological community provides in these areas should be recognized and should not be discouraged by unnecessary regulation.

We should take advantage of this opportunity to clarify various issues that have been raised over the past 5 years. Such issues generally address the proper roles that the National Marine Fisheries Service and the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) should play in regulating the various activities affecting marine mammals. The MMPA and its legislative history indicate that Congress intended the statute to only apply to marine mammals in the wild. The National Marine Fisheries Service and the U.S. Fish and Wildlife Service are responsible for enforcing the Act. The Animal Welfare Act (AWA), enforced by APHIS, regulates the care and maintenance of marine mammals in zoological facilities. Through the years, much confusion has developed over what role each agency should play. This confusion has led to duplication of effort, conflicting standards, and law suits. Resources are consequently diverted from protecting marine mammals to litigation and other diversionary activities.

The MMPA should be clarified to further strengthen Congress' original intent that NMFS has and should maintain the authority to issue permits for "takes" from the wild and for the importation of marine mammals or marine mammal parts from a foreign country. The term "take" should be explicitly clarified to include only activities in the wild or affecting a marine mammal's natural habitat.

The law should also be revised to make it clear that once a permit is issued, the marine mammal and its progeny can be lawfully owned, possessed, transported, sold, or purchased without the need for any additional permit, provided the Secretary of Commerce is notified in advance of any such transaction and that the transaction is for a purpose authorized by the MMPA.

NMFS should maintain its authority to enforce criminal and civil penalties against anyone possessing a marine mammal or marine mammal part in violation

of the Act. In addition, NMFS should continue its current practice of collecting annual reports from anyone in possession of a marine mammal, its progeny, or a marine mammal part. This would enable the Secretary to keep track of the status of the animal or part and to enforce the Act.

I believe that the NMFS rule proposed last October represents a major public policy shift from the current scheme for regulating activities affecting marine mammals. If adopted, this rule would create new requirements, a new Federal bureaucracy at NMFS, and has the potential for creating another Federal bureaucracy at the U.S. Fish and Wildlife Service. I hope that NMFS will refrain from continuing to promulgate this rule until Congress has addressed the issues it raises in this reauthorization process.

Mr. Chairman, I look forward to working with you and the other members of the Committee during the coming months. Together, I believe that we can craft legislation that recognizes the valuable role that zoological facilities play in educating the public about the wonders of marine mammals. Additionally, I believe that we will be able to clarify the regulatory responsibilities of NMFS for marine mammals.

[Statement of Mr. Bilirakis follows:]

STATEMENT OF HON. MIKE BILIRAKIS, A U.S. REPRESENTATIVE FROM FLORIDA

First, I would like to take this opportunity to thank Chairman Studds and the Committee for holding these important hearings on the reauthorization of the Marine Mammal Protection Act and the issue of public display.

As most of you know, Florida holds about 40 percent of all captive dolphins. Furthermore, most of the dolphins that are seen in theme parks across the country and the world were probably captured or have ultimately come from Florida waters.

In 1972, Congress passed the Marine Mammal Protection Act or (MMPA). The purpose of this legislation was to ensure that these mammals were maintained at, or restored to, healthy population levels. The Act established a moratorium on taking or importing marine mammals except for certain activities regulated and permitted under the Act. These permitted activities include public display and scientific research.

Unfortunately, jurisdiction over marine mammals is divided among several agencies. I believe we have a classic example of the dangers of Federal bureaucracy. We have several agencies contradicting one another with regard to this Act, and in some cases, I believe the agencies are not doing their job correctly to ensure that these mammals are being treated humanely and captured properly.

Late in the 102d Congress, I introduced legislation titled the Marine Mammal Capture, Export and Public Display Act. I reintroduced this bill in the 103d Congress on January 27, 1993, and, to date, 43 Members of the House have joined as cosponsors.

Simply put, I believe more can be done to prevent the needless deaths of our nation's marine mammal population. My bill, H.R. 656, aims to provide greater protection for these animals in three main areas: capture, export, and public display.

With regard to export, currently, the Marine Mammal Protection Act is silent on the export of marine mammals either caught in U.S. waters or bred in U.S. zoos and aquaria.

My bill would end this silence. The bill bans the export of marine mammals, unless the animal is exported in order to improve its health or well-being. It is simply hypocritical to place stringent requirements on theme parks and oceanariums in *this* country but allow dolphins to be exported to other countries where they may be mistreated.

Public display standards are also outlined in my bill, and I believe that the safety standards applied to dolphins and other marine mammals in captivity must be reexamined. My bill would require the Secretary of Agriculture to review the standards established under the Animal Welfare Act for the care and habitat of marine mammals in captivity.

Specifically, the Secretary would determine whether or not those standards are adequate, considering: (1) the sizes of marine mammals, (2) current knowledge of marine mammal physiology and behavior with respect to their need for exercise, auditory capabilities, and their pre- and post-natal requirements, (3) their psychological and physical well-being, (4) their needs related to social grouping, including minimum group size, gender, mix, and age composition, (5) interspecies compatibility, and (6) environmental modifications that might allow for more normal behavior and social interaction.

H.R. 656 also addresses research permits. Permits for research on marine mammals would be limited to 2 years, unless the Secretary of Commerce issues an exten-

sion for a long-term study. Guidelines would be set up for release of marine mammals taken for research back into the wild so that this is done in the most humane manner possible. The Bill requires that the animals be released at their original site of capture and encourages non-invasive research whenever possible.

Finally, my Bill imposes increased penalties for non-compliance. The Bill would raise the penalties for those who violate provisions of the Animal Welfare Act relating to marine mammals to equality with the penalties under the Marine Mammal Protection Act. Specifically, the Bill establishes civil penalties of not more than $10,000 for each violation; criminal penalties for a knowing violation of not more than $20,000 for each violation; and includes the possibility of imprisonment for not more than one year for violation of the Act.

My involvement in this issue stretches back several years and is based both on what I have observed and what informed individuals and experts in my district have indicated is the current state of affairs. In the spring of 1991, for example, a television station in my district aired a week-long report concerning marine mammals. This investigating series, "Dolphins: Dying to Please You," documented how these animals are captured off the coast of Florida and what life awaits them after capture.

I believe that most people would be surprised to learn that in order to receive a permit to capture a dolphin, all one really needs to do is apply for a permit with the National Marine Fisheries Service. The fee for such a permit ranges from $25–$200 and the requirements on the permit holder are virtually non-existent—all one really needs is a net and a boat.

Animals are also captured without the supervision of the National Marine Fisheries Service or any other of the several regulatory agencies overseeing marine mammals.

Economics drives the process. It is estimated that the worth of unmarked and trained dolphins ranges from about $50,000 to about $100,000. Thus, the rewards are significant while the barriers of entry are low.

We must additionally remember the consequences of our actions. Dolphins in the wild generally live to be 45 years old, but this dramatically changes once the dolphin is in captivity. Often, captive dolphins do not live to half of their normal life span.

The reason for these deaths is often related to stress. We know that dolphins in the wild often travel together in families, better known as pods. Once these dolphins are captured they are thrown into a very different world. Dolphins will be separated from each other, unable to have the same contact with other members of their species.

Many times, dolphins are also placed in small tanks of water. These tanks may be smaller than a swimming pool you might find in someone's back yard, and the dolphins are thus severely restricted in comparison to their natural state. This treatment alone often results in the deaths of these animals.

We must end this cycle and treat dolphins as well as other marine mammals in an intelligent and humane manner. My Bill seeks to encourage this and I am hopeful that the Subcommittee will also act on some of the reforms I have outlined.

In closing, I would again like to express my gratitude to Chairman Studds and the Committee for giving me the opportunity to address the Subcommittee today.

I would be delighted to work with the members of this Subcommittee—and, indeed, the Full Committee—in any way possible to help craft and strengthen the Marine Mammal Protection Act.

Thank you.

[Statement of Mr. Lipinski follows]:

STATEMENT OF HON. WILLIAM O. LIPINSKI, A U.S. REPRESENTATIVE FROM ILLINOIS

Mr. Chairman, I want to thank you for this opportunity to express my concerns about the reauthorization of the Marine Mammal Protection Act (MMPA).

Last year the National Marine Fisheries Service (NMFS) issued proposed regulations which would change the way public display and scientific research facilities are regulated. While I applaud their efforts to protect marine mammals, I have some concerns about these new proposals.

At a time when President Clinton is trying to streamline the Federal Government, the NMFS proposals apparently create a duplication of jurisdiction and procedures.

If NMFS is concerned with strengthening current regulations, perhaps it could be better accomplished by helping the Animal and Plant Inspection Service (APHIS) to reinforce their procedures. It is my understanding that APHIS and NMFS currently share jurisdiction of display and scientific facilities under an interagency

agreement. A further agreement could avoid the creation of government bureaucracy and waste.

I am concerned that the display and scientific community, which has played an invaluable role in educating the public about marine mammals, could become over-regulated. Perhaps amending the MMPA to create clear jurisdictions would be the best course of action.

Mr. Chairman, I look forward to the outcome of these proceedings and the introduction of reauthorization legislation.

Mr. STUDDS. We will hear from our colleague, a distinguished former member of this Committee, the gentleman from Florida, Mr. Goss. Welcome.

STATEMENT OF CONGRESSMAN PORTER GOSS, A U.S. REPRESENTATIVE FROM FLORIDA

Mr. GOSS. Thank you, Mr. Chairman. I can say after listening to the introductory remarks that I am pleased to be back in the room. I think that the mood of this Committee has always been one of vision, tempered with a little humor. And I am pleased to see that it still laughs and I hope it does throughout this hearing.

I would like to ask that my written statement be accepted into the record and I will try to abbreviate the salient points.

Mr. STUDDS. Without objection.

Mr. GOSS. Thank you very much. The purpose of me being here really is to ask that you all consider folding into the legislation that you have before you my Bill H.R. 585, which is mistitled The Marine Mammal Public Display Reform Act, and that is my misstatement. It is in fact titled that. It really should be called the Marine Mammal Capture Reform Act because it goes to the question of capture and how we do it, rather than to the question of display. The whole Free Willy argument, which was eluded to in opening remarks, is not what this legislation is about.

I want to point out that this is not a new idea that I am going to explain in a moment. It is one that has been around for a while and I think it is particularly cogent to the fact that there are differences in our resources in this country. In some areas that are blessed with resources we do a very good job of trying to provide appropriate stewardship for them. And that is the case with dolphins in Florida.

The attractions industry was very alarmed when we first started talking about this, probably because of the title rather than the content of our Act. We have tried to alleviate their concerns. I have got to say that nobody in their right mind would think that Florida is not attractions-friendly. Florida is perhaps the most attractions-oriented State in the union. I would certainly say that Florida dolphins are swimming all over the world at this point. We know they have been captured and exported to various exotic foreign destinations, including Baltimore and places like that, but also out of the country.

We even export mice. We got them from California, but we ran them through Orlando and now they are trying to export them to Virginia, I understand. So we are very much in the business of attractions, and I hope that if anyone still has concerns they will listen closely and read my remarks because we have addressed all of the areas that they were concerned about.

My bill is not Mr. Bilirakis' bill, which seeks to provide protection for our dolphins. I am a co-sponsor of his bill. However, what we try and do in my bill is put a recognition on the fact that States like Florida have taken extra provisions to describe certain specified areas done on a scientific basis as sanctuaries for certain types of marine resources. In some cases we call them aquatic preserves. We also have other labels for other types of water bodies. These are places where we do not allow normal commercial fishing to go and we have special rules in order that stocks can be replenished. It is a very basic simple concept and, frankly, it works quite well if we allow it to work.

We are asking that States that do this and demonstrate that they have created these types of special sanctuary areas or reserve areas, be allowed to do that and protect those areas from other activities which might be permitted under a Federal permit granted by the National Marine Fisheries Service under the marine mammal process.

The concern is: that we would be able to declare all of Florida off limits and nobody would be able to catch dolphins in Florida and that would destroy the industry because that is where, in fact, a great number of dolphins for display are caught. That is not what this is about and that is not what we are trying to do at all. We are trying to make sure that there is protection in those areas where dolphins do congregate, and these are not migratory dolphins, these are not the true Atlantic dolphin that swim up and down the coast, these are the dolphins that basically like it in Florida and live there and don't leave. They have resettled there as it were. And they deal in regions. We have regions such as Charlotte Harbor which many of you have heard me speak about before, where we found we were taking too many dolphins and depleting the stock. And wisely the Marine Mammal Service stopped, the National Marine Fisheries Service issued a moratorium on captures while we studied the matter further. And in fact it was their own study that showed us that we were having a depletion problem.

Interestingly enough, the State of Florida had already created a series of regulations that said these types of water bodies are very important to Florida for reestablishing our stocks, and we shouldn't be allowing commercial taking of all kinds of fish and mammals in that area; in fact, we need to protect other things including manatees, a whole other series of issues.

And Florida has been very responsible. To come along with a Federal law that undercuts that responsibility, in my view is an error. And that is what my legislation seeks to correct, to allow States that have done something responsible to continue to do that responsible thing.

I don't believe there are any injured parties in this legislation. There are plenty of places to capture dolphins in Florida that are not in aquatic preserves, more than enough to take care of all the requirements that are out there right now, I understand.

The situation is actually serious enough in the Gulf Coast area that there has been a moratorium on dolphin takings, because we have had an outbreak as we had off New Jersey some years ago, we don't understand it yet but there is a threat. And wisely there has been a moratorium.

Unfortunately, that moratorium may end in the very near future, and once again we will not have protection in our aquatic preserves for the stocks that we are trying to protect.

The tragic story has been that the lack of coordination between what the State is doing now and what the Federal Government is doing under its present regulations has caused honorable people going about their business in a reasonable way, and I cite the Baltimore Aquarium as a case of trying to properly get display dolphins for the aquarium. To run afoul of Florida laws and get into a series of bad situations that totally could have been avoided if we had removed the inconsistencies in these laws. They would have been able to get their dolphins, there wouldn't have been bad press and probably the dolphins would have survived because we have a process of doing a better job of screening and understanding what we are about and how they are moved about and handled, rather than the way it did come about where, in fact, one of the dolphins did die.

So, this legislation that I am proposing for your consideration is presently a free-standing bill and we are going to pursue it, but I think this is the appropriate place for it. If you don't, we will pursue it anyway, we hope with your blessing. Because I know of no negative consequences from proceeding with it.

I thank you, Mr. Chairman. I am of course very available to answer any questions.

[Statement of Mr. Goss follows:]

STATEMENT OF HON. PORTER GOSS, A U.S. REPRESENTATIVE FROM FLORIDA

Mr. Chairman, I appreciate the opportunity to discuss the issue of marine mammal protection with your Subcommittee today. Specifically, I would like to discuss "The Marine Mammal Public Display Reform Act," H.R. 585—a bill that has bi-partisan support, including support from several members of the Merchant Marine and Fisheries Committee.

Simply put, my bill would allow States to provide additional protection for marine mammals in specifically designated State waters, and veto permits for marine mammal captures in those waters. By so amending the Marine Mammal Protection Act (MMPA), we could close a loophole that actually prevents protection for marine mammals. I believe that it is an unfortunate irony that under the current rules of the MMPA, States are denied the ability to safeguard specific populations of mammals in their own waters.

In my State of Florida, there are laws on the books which would prohibit the capture of marine mammals areas known as "aquatic preserves," which are specifically defined by statute, and have clearly defined borders. These areas have been set aside because the duly-elected government of Florida has decided that the preservation of the natural resources within these boundaries is vital to the State's interests.

The Marine Mammal Protection Act, unfortunately, and I believe, inadvertently, preempts Florida's effort to responsibly protect this element of its natural resources. Several other States have gone the extra mile to provide protection for their coastal waters and marine resources—like Florida, these States are also prevented from enforcing these measures.

As you are aware, H.R. 585 has come under heavy attack by the public display industry. I would like to take the opportunity to respond to the industry's concerns, and allay any fears that this amendment would somehow damage public display institutions.

The argument most commonly used against State veto power is that it would upset the MMPA's regulatory regime. Under the MMPA, the National Marine Fisheries Service (NMFS) is charged with determining marine mammal populations in the Nation's coastal waters, and then setting quotas for animal removals in specific areas. Allowing States to close off certain waters to marine mammal captures would not prevent NMFS's from carrying out these responsibilities.

The display industry contends that dolphins are migratory, and therefore a "State's rights" amendment to the MMPA is inappropriate. While it's true that Atlantic dolphins are migratory, pods in the Gulf of Mexico tend to be region-specific.

Another contention is that H.R. 585 would burden interstate commerce. While any State which attempted to limit dolphin captures to facilities within State boundaries would violate interstate commerce rules (and any State veto issued under such circumstances would be invalid), that is not the type of "protection" provided for in this bill.

Finally, the argument is made that there is no basis for the belief that dolphins do not do well in public display institutions. In terms of H.R. 585, this is also an irrelevant argument. States such as Florida have attempted to close off certain State waters for economic and environmental reasons, not because of any aversion to public display facilities. In fact, Florida has more public display facilities than almost any other State!

I am aware that there has been a voluntary moratorium on dolphin captures in the Gulf of Mexico since 1990. NMFS has asked that this moratorium be adhered to while it updates its quota system, and while it investigates the so-far unexplained die-offs that have been occurring among the dolphin populations in the Gulf.

Yet this is no reason to avoid action. This year NMFS extended several capture permits for Gulf waters. In addition, I am informed by that agency that the voluntary moratorium could be lifted as early as this year.

The purpose of the Marine Mammal Protection Act is to protect marine mammals, and if a State chooses to offer greater protection for dolphins within principals of the MMPA, it should not be prevented from doing so. H.R. 585, which was originally drafted with the assistance of the former chief counsel of the Marine Mammal Commission, was drawn to protect dolphins and States' rights within narrow limits.

I urge this Committee to adopt this simple, rational approach to additional marine mammal protection as it considers the reauthorization of the Marine Mammal Protection Act.

Mr. STUDDS. We thank you and we miss your constructive contribution to this Committee and we are glad to have you partly back. Are there any questions for the gentleman? If not, let me again, I know that I speak for the staff as well, thank you for your cooperation and we will do our best to do the right thing.

Mr. GOSS. I appreciate that, thank you, Mr. Chairman.

Mr. STUDDS. Thank you very much. While we bring forward the remaining seven witnesses as a single panel, let me invite anybody who needs a seat and can't find one, especially those of you who have to write, are welcome to sit on this lower tier here and you can take advantage of the reassembly a moment to do that. Anyone is welcome to do that.

If all seven of the remaining witnesses could come up as a single panel, we would appreciate it. I apologize for some of our constrictions here. I think the staff has alerted you to our infamous 5-minute rule. We are going to ask you to confine your oral statements to no more than 5 minutes. Your written testimony will appear in its entirety in the record. And we will also apply the 5-minute rule strictly to ourselves in our questioning. If you have not seen this before, the lights there are somewhat barbaric. The yellow light will go on when you have one minute left and when the red light goes on, you have concluded. We will, in fact, apply that rule to ourselves as well, so you shouldn't feel bad as a public clamor for the Congress to apply all rules to itself. And we intend to do precisely that.

I would just add that we are under considerable time pressure. The House is in session, we will probably be interrupted for votes and we are going to try to move as rapidly as we can.

We will begin with Dr. Nancy Foster, Deputy Assistant Administrator for Fisheries at NOAA, welcome.

STATEMENT OF DR. NANCY FOSTER, DEPUTY ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

Dr. FOSTER. Thank you. Good afternoon, Mr. Chairman and members of the Committee. I am pleased to be here one more time to testify before this Committee on aspects of the Marine Mammal Protection Act (MMPA) other than marine mammal interactions with commercial fisheries.

The MMPA was passed over twenty years ago, we believe with the objective of offering special protection and humane treatment to all marine mammals, both in the wild and in captivity.

Some years ago, back around 1988, we became aware of some problems that we were having in administering our permitting program and we began the infamous 5-year review of the permit program. The review resulted in some administrative improvements which we are trying to implement now and in a proposed rule. The rule was aimed at clarifying and ensuring uniform application of procedures and requirements.

Today it would seem to us that we face two questions. First, does the Marine Mammal Protection Act provide its special protection for captive animals, and if so, is there a duplication of regulatory responsibility among Federal agencies? Second, what and how should permitted activities be handled dealing with marine mammals in the wild?

It is our understanding that the public display community believes that the MMPA's jurisdiction over marine mammals ends after the animal has been removed from the wild. They also feel, I think, that there is some duplication of responsibility, particularly between the Animal and Plant Health Inspection Service (APHIS), NMFS, and the Fish and Wildlife Service. And they are suggesting amendments to deal with this.

Needless to say, we disagree with both assertions and in fact we think that such amendments are unnecessary. We find it kind of curious that we are here after 20 years of applying Marine Mammal Act protection to captive animals and 20 years of working with APHIS to discuss these particular questions.

We do believe that the current law applies to animals in captivity. And we believe that our responsibility and APHIS's responsibility are complementary rather than duplicative, and we think that is borne out through our MOA.

However, we also agree that since this question has come up it has to be dealt with, that it is too important to leave for everybody to interpret on their own. We agree that we should deal with it directly and we hope to see a clear statement of the intent of Congress. We think that since this is the time when controversy over public display continues, that it is critical that the regulated communities and the public understand what laws apply to these animals and what Federal agency has jurisdiction and to what extent.

Now looking into the wild, we have been very concerned with the growing dissatisfaction among the research community about the fact that they perceive that the regime under which they operate is often more burdensome than that which we apply to the incidental take of marine mammals in commercial fisheries.

We agree that the permit requirements today under the MMPA are too burdensome, lengthy and inflexible when it involves research of the non-intrusive kind involving generally close approach to marine mammals in the wild. And we believe that the MMPA should be amended to shorten and simplify the process for research involving these low level types of harassment.

We also believe that there should be a provision made for yet another kind of permit; the kind of permit that would allow the public to observe these animals in the wild and would allow them to photograph and bring the films and photographs back to those who will never have the opportunity to see these animals in their natural habitats.

We think that the way it is now, we find ourselves forcing these activities under research permits. And that is simply not workable.

We also believe that the law should be amended to allow the import and export of native art for purposes of exhibit in museums or any other institution with public access and also for other purposes involving cultural exchanges.

We have a few other suggestions but these are all included in my testimony, which I will submit for the record, and I will be glad to answer any questions. The green light is still on.

[Statement of Dr. Foster can be found at the end of the hearing.]

Mr. STUDDS. There is absolutely no precedent for that whatsoever. We don't know how to proceed. Thank you very much. Ms. Mollie Beattie, the new Director of the Fish and Wildlife Service. I think this is your first visit officially with us. We are delighted to have you.

STATEMENT OF MOLLIE BEATTIE, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Ms. BEATTIE. Thank you very much, Mr. Chairman. It is a delight to be here and to have this be my first testimony on such an important issue and one in which the Fish and Wildlife Service is deeply interested.

In addition to an overview of the activities of the U.S. Fish and Wildlife Service, my statement, of which a longer version has been submitted for the record, provides information on the status of marine mammals under our jurisdiction and proposals we are considering for amending the Act.

The Act establishes a Federal responsibility for the conservation of marine mammals. Under the Act, the Secretary of the Interior, through the Service, is responsible for protecting and managing polar bears, sea and marine otters, walruses, manatees and dugong.

In conducting these activities, the Service maintains a cooperative working relationship with the Marine Mammal Commission and its committee of scientific advisors, the National Marine Fisheries Service, the newly created National Biological Survey, the Bureau of Indian Affairs, and other Federal agencies. We also cooperate with affected States, Alaska native organizations, conservation organizations, and other entities on marine mammal issues of mutual concern.

All three species of manatees, the dugong, the marine otter and the southern or California sea otter are listed as endangered or

threatened under the Endangered Species Act and, therefore, are considered depleted under the Marine Mammal Protection act. Marine mammal species under service jurisdiction in Alaska are considered to be non-depleted and populations are currently believed to be healthy.

The Pacific walrus, a population shared with Russia, had an estimated minimum population of 201,000 in 1990 based on a joint Russia-U.S. population survey. Although this estimate is less than the estimate of 232,000 animals derived from the 1985 survey, anomalous ice conditions prevailed during the 1990 survey and comparing the two estimates is, at best, a tenuous proposition. The Service believes that the Pacific walrus population is at or near historic high levels and is stable or slightly decreasing.

The polar bear population in Alaska is shared with both Canada and Russia and is believed to number about 5,000 animals. The northern, or Beaufort Sea, population is estimated to be 1,800 animals. The western, or Bering-Chukchi Sea, population is believed to number about 3,200 animals. The Service considers polar bear stocks in Alaska to be healthy and possibly increasing slightly.

A growing population of sea otters in Alaska estimated to number between 100,000 and 150,000 has become reestablished in most of the species' historic range and is considered by the Service to be healthy. Although the population as a whole is healthy, specific subpopulations within the State are of concern. The south-central Alaska sea otter population is in a recovery phase from acute mortality following the Exxon Valdez oil spill of 1989, and long-term sublethal effects on the population are not well understood. In southeast Alaska, harvest numbers have increased dramatically and there is concern that the population level may be affected.

Although the Service believes that population levels of these three Alaska marine mammals are sound, we are considering proposals addressing issues necessary to ensure their long-term viability. These proposals include the following, that will be discussed in the order they appear in the Act.

Whether the Act's language is precise enough to allow specific protection of marine mammal habitats has been questioned.

In section 2(7) of the Act, Congress found that marine mammal management should "maintain the health and stability of the marine ecosystem." While single-species-oriented initiatives have achieved some important success under the Act, greater emphasis must be placed on understanding and managing the complex factors that govern the health and stability of the marine environment.

By adopting an anticipatory, ecosystem-based approach to managing marine mammals and their habitat, it should be possible to protect living marine resources, avoid legal restrictions that could hinder resource use and development activities that impact protected species, and advance the Act's primary goal of marine ecosystem health and stability.

To ensure the authority to develop regulations to protect specific threatened or vulnerable habitats, we are considering recommending amendments to sections 2 and 3 to include and broaden habitat protection provisions. The habitat protection provision of the 1973

International Agreement on the Conservation of Polar Bears may also need to be specifically addressed.

The Service is concerned with the clarity of definitions in section 3. For example, the Act is ambiguous about what constitutes an authentic native handicraft, and the lack of specificity hinders management activities such as providing sound legal advice to native hunters.

The term edible portion is not currently defined, and that has led to the sale of gall bladders and male reproductive organs as aphrodisiacs or for other purposes. The increased sale and interstate transportation of these items could affect the harvests of certain species, such as polar bears.

We are also reviewing ways to enhance the management provisions of section 101(b) by authorizing the Secretary to initiate the development of harvest restrictions when the population of a species declines to 10 percent above the depletion level.

The actual implementation of those restrictions would not occur until the species is at the level of depletion. We are considering a process that would maintain the integrity of the native subsistence exemption while ensuring that a critical regulatory program would be in place at the point of depletion and not years later.

This proactive approach would ensure that marine mammals continue to provide subsistence benefits to future generations of Alaska natives without imposing unnecessary restrictions on these benefits.

We emphasize our support of a native exemption, resist any attempt to weaken it, and restore our pledge to work with Alaska natives should we find ourselves in a depletion situation. Thank you, Mr. Chairman.

[Statement of Ms. Beattie can be found at the end of the hearing.]

Mr. STUDDS. Thank you. Let me just reassure members who are wondering about those bells. Six bells is either a recess or an air raid and we have ascertained it was the former. We are back in session. Dr. John Reynolds, Chairman of the Marine Mammal Commission. Dr. Reynolds.

STATEMENT OF DR. JOHN E. REYNOLDS, CHAIRMAN, MARINE MAMMAL COMMISSION

Dr. REYNOLDS. Thank you, Mr. Chairman. It is a pleasure to address you and the Committee this morning.

The written statement that I have provided you is long and comprehensive and at this point I would just like to summarize certain important points that we made in it.

Over the past several years many scientists, including members of the Commission and its Committee of Scientific Advisors, have expressed concerns regarding the permitting process. In response to the intensity of these concerns, the Commission convened two workshops in 1993 to discuss the perceived problems and to identify possible solutions.

Seven major problem areas are identified and noted in my written testimony.

In my written statement I also suggest several steps that Congress might take to address these problems including the following:

encourage the National Marine Fisheries Service and the Fish and Wildlife Service to develop clear, concise instructions for preparing permit applications; direct the Services to advise applicants within 30 days of receiving an application if it is complete or not, and finish reviews within 60 days of an application's being judged complete; authorize the Services to exempt certain categories of research from the notice and comment requirement and perhaps other requirements related to permit review; streamline procedures for authorizing the importation of specimens for scientific purposes; clarify in report language that the term bona fide refers to an application made in good faith without fraud or deceit, an application made with earnest intent, and one for which the scientific purpose is neither specious nor counterfeit; amend the Act to enable the Secretaries to authorize the taking of marine mammals including depleted species, incidental to filming for either educational or commercial purposes under certain conditions when harassment might occur; and authorize the Secretaries to waive the 30-day public notice and comment period when delaying research could result in harm to a species, population, or individual marine mammal, or result in loss of unique, unforeseen research opportunities.

Other problems with the scientific research program identified by the participants can be addressed administratively, we think.

The Commission is opposed to the needless use of invasive and lethal research techniques, but believes that there are instances when lethal or invasive research is necessary and appropriate to further basic knowledge.

We also note that existing statutory provisions ensure that such techniques will not be used when nonlethal or less invasive methods are practicable.

In my written statement, I address at length the question of which agency or agencies should be given jurisdiction over captive marine mammals. The Commission believes that split jurisdiction works. While the Animal and Plant Health Inspection Service has experience with captive animals under the Animal Welfare Act, and can inspect facilities, it does not have the expertise with respect to marine mammal biology, physiology, behavior, and specific marine mammal needs that the National Marine Fisheries Service and the Fish and Wildlife Service have.

The responsibilities of the three agencies are largely complementary. Since the Interagency Agreement in place since 1979 works and there is little duplication of effort under the Animal Welfare Act and the Marine Mammal Protection Act, we recommend that Congress clarify that the jurisdiction over captive marine mammals is intended to be provided under both Acts.

My written statement also provides comments on other permit-related amendments proposed for consideration during reauthorization. These include the use of marine mammals in interactive displays, the importation of depleted marine mammals for public display, the applicability of the National Environmental Policy Act to the capture of wild marine mammals for the purpose of public display, and the prohibition against feeding wild marine mammals.

My written statement also discusses issues of interest to Alaskan native groups who seek to ensure 1) that the current exemption allowing the taking of marine mammals for subsistence and handi-

craft purposes is maintained; 2) that cooperative efforts are enhanced between the Alaskan natives and the Fish and Wildlife Service in managing polar bear, sea otter and walrus populations; and 3) that the restrictions regarding importation of personal items made from marine mammal parts be relaxed.

The Commission supports retention of the existing exemption for Alaskan natives. As was recognized by Congress when the Act was passed in 1972, traditional uses of marine mammals by Alaskan natives should be protected and given primacy over other uses.

The Commission shares the belief that cooperative efforts between appropriate government agencies and native groups provide the best long-term solution for managing the take of marine mammals so as to not adversely affect marine mammal populations while meeting subsistence requirements.

The Commission further believes that the Act now provides authority to the Fish and Wildlife Service to grant financial assistance to Alaskan natives participating in cooperative management activity, but that it might be useful to note this in report language so as to help ensure that moneys are available.

The amendment to authorize importation of certain marine mammal items would likely have little effect on marine mammal populations but would have important benefits to Alaskan natives by fostering relations among circumpolar natives. With a few minor modifications, enactment of such an amendment is supported by the Commission.

Thank you for inviting me to speak to you today.

[Statement of Dr. Reynolds can be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, sir. Next, Mr. Robert Jenkins of the American Zoo and Aquarium Association. Mr. Jenkins.

STATEMENT OF ROBERT JENKINS, AMERICAN ZOO AND AQUARIUM ASSOCIATION, ALLIANCE FOR MARINE MAMMAL PARTIES AND AQUARIUMS

Mr. JENKINS. Good morning. Mr. Chairman and members of the Committee, I am Robert Jenkins, Executive Officer for Environmental Affairs at the National Aquarium in Baltimore.

Today I am representing the 31 members of the Alliance of Marine Mammal Parks and Aquariums and the 162 accredited institutional members of the American Zoo and Aquarium Association.

The Alliance and the AZA strongly support the Marine Mammal Protection Act. The MMPA was enacted to protect declining populations of marine mammals. To increase awareness and generate support, Congress looked to zoos and aquariums to educate the public about these magnificent animals. It is understood that public display facilities reached millions of Americans every year with effective education and conservation messages.

Today, more than 115 million people visit our facilities each year. In addition to learning the basics of marine mammal biology and natural history, visitors to our facilities leave with a new awareness that the health of the natural world and human behavior are closely intertwined.

In addition to the displays and information that are presented to all visitors, our facilities reach out to our communities with spe-

cially designed, in-depth programs that enhance classroom science. Over 8 million children visit our facilities each year; and another 2 million participate in outreach programs. Many State educational guidelines encourage teachers to use our facilities as community science resources. There are simply no other programs available that can compare to the education opportunities we offer.

In addition to our role as public educators, we have spent over $20 million on scientific research alone in the last 5 years. We have published over 1600 research studies reporting our breakthroughs in animal health, behavior, physiology, blood chemistry, animal communication and reproduction. Those efforts have led to incredible advances in our veterinary care, husbandry training practices and behavioral and social enrichment programs.

Today, nearly 40 percent of the marine mammals in our facilities have been born and raised there, a result of the extraordinary care given by our veterinarians and marine mammal biologists who have devoted their lives to the well-being of these animals.

Further applying our knowledge, we regularly volunteer time and resources to help rescue, rehabilitate, and hopefully, release the marine mammals who strand on our beaches. This has resulted in the return of over 1500 live marine mammals back to the wild in the last 5 years alone, more than we currently have in our collections.

Our institutions have enormous expertise and knowledge that is recognized and sought after around the world. Our experts helped in the Valdez oil spill. We have been consulted by China in their work on the Baiji River dolphin now close to extinction. And, at the request of NMFS, we have applied our knowledge in a study on the health of dolphins in the Gulf of Mexico, to name but a few examples.

The American public knows what we do and they support it. According to a recent independent Roper Poll, a nearly unanimous 92 percent recognized the important role we play in educating our visitors about marine mammal conservation. An impressive 86 percent stated that they are more likely to be committed to conservation after visiting our facilities, just as the drafters of the MMPA knew they would.

Mr. Chairman, the MMPA is an important law, sufficient in scope and authority. We fully support is reauthorization. As the Congress considers adjustments to the Act, we urge you to reaffirm the important role modern zoos and aquariums play in achieving the goals of the Act.

We would also like to see simple language added that would reenforce the Act's original intent and clarify the confusion over agency jurisdiction which has diverted time and resources away from our programs and our animals.

The proposed permit regulations recently published by NMFS serve as a case in point. If adopted, exemplary facilities like those in the Alliance and the AZA would face burdensome and confusing requirements. These regulations would duplicate and perhaps conflict with standards already set by the Animal and Plant Health Inspection Service. Such duplication would be cumbersome and, in the end, would not provide any real benefit to marine mammal welfare or conservation.

In an era of Federal deficits and efforts to streamline government bureaucracy it does not seem wise to have several agencies regulating the same thing.

Mr. Chairman, since 1972, the public display community has answered the call to help conserve marine mammals. We ask that you support the invaluable work we do and help us ensure that present and future generations of Americans have the opportunity to learn about the importance of marine mammal conservation.

Our specific legislative recommendations are found in my written testimony. To assist the Subcommittee in these deliberations, I have asked a panel of experts to be with me here today and I can introduce them at the appropriate time. I thank you for the opportunity to comment.

[Statement of Mr. Jenkins can be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, sir. Let me just observe those two bells are a vote on the floor. It is my intention to adjourn for only as long as it takes me to get across the street and back, which I would guess is about seven and one-half minutes. So, we will stand at adjournment just for that amount of time. Thank you. We apologize for the delay.

[Recess.]

Mr. STUDDS. We apologize for the first of several inevitable interruptions and we will resume with Dr. John Grandy of the Humane Society. Dr. Grandy.

STATEMENT OF JOHN GRANDY, VICE PRESIDENT FOR WILDLIFE AND HABITAT PROTECTION, HUMANE SOCIETY OF THE UNITED STATES

Mr. GRANDY. Good morning, sir. I am Dr. John Grandy, vice president for Wildlife and Habitat Protection with The Humane Society of the United States and Humane Society International.

I thank you, Mr. Chairman, for the opportunity to testify today on behalf of The Humane Society of the United States and fourteen other member organizations of the Marine Mammal Protection Coalition and our combined membership and constituency of over 3 million persons worldwide.

Public opinion concerning marine mammals in captivity has been changing. Documentaries, research on free living animals, wildlife photography and films, such as "Free Willy" as you mentioned, have established a new public awareness of the complex nature of these animals.

The hundreds of thousands of calls made to the 800 number at the end of Free Willy, as well as the proliferation of aquaria without live marine mammal exhibits, the closing of seasonal dolphin shows at amusement parks, and State legislation prohibiting public display, illustrate that the debate on public display is entering a new era.

My comments are detailed in my testimony and I will summarize them at this time. First, we believe the Marine Mammal Protection Act should be amended to clarify the jurisdiction between APHIS and the National Marine Fisheries Service. We certainly agree with Dr. Nancy Foster that this needs to be done and it needs to be done now.

Our organizations believe strongly that the National Marine Fisheries Service has primary responsibility for the care and maintenance of marine mammals in captivity. It is vital that primary oversight of marine mammals continues to rest with NMFS, not APHIS. APHIS has been persistently reluctant to modify certain requirements for marine mammals because such requirements could then apply to all captive animal species. APHIS simply has too broad a mandate to have primary oversight of captive marine mammals which have very specialized species-specific requirements.

Most importantly, however, we must clarify that the Marine Mammal Protection Act clearly grants NMFS statutory authority over all marine mammals, regardless of the environment they inhabit. As NMFS has maintained, and we concur, captivity is a form of take and NMFS has jurisdiction over marine mammal takes.

Second, the Marine Mammal Protection Act should be amended to prohibit the capture from the wild of marine mammals for public display as well as their import and export. Public display can be a tool for education and conservation without capturing healthy individuals from intact social groups in the wild.

Public display facilities can use captive-bred and unreleasable stranded animals for their exhibits when this is appropriate.

Furthermore, we now have a better understanding of marine mammal species in the wild. We know that many exhibit long-term familial bonds and in general are socially complex, long-lived and mentally sophisticated creatures. Wild cetaceans may travel up to 50 to 100 miles a day, dive several hundred feet deep, and spend only 20 percent of their time at the surface of the water. The transition from their natural environment to captivity in a small concrete tank can only be unimaginably traumatic.

The capture process itself, where animals are rounded up, netted, lassoed, or driven into shallow water and separated from their companions is incredibly cruel and stressful.

The public has received the message of conservation and habitat protection. We urge the Congress to maintain and support that.

Third, the Marine Mammal Protection Act should be amended to prohibit all forms of direct contact between the public and marine mammals. We believe that petting pools, feeding programs, and swim-with-the-dolphin programs do not constitute legitimate forms of public display under the Act.

We believe there is a strong potential for tragedy in these forced interactions and we oppose them.

Fourth, the MMPA should be amended to prohibit the intentional feeding of marine mammals in the wild. We strongly supported NMFS when it issued regulations banning this disruptive practice. Feeding wild marine mammals may habituate them to the approach of boats which could result in injury and may cause disruption of natural foraging patterns and result in introduction of pathogens and parasites.

Fifth, the Marine Mammal Protection Act should require that the disposition of stranded marine mammals be strictly regulated. The Marine Mammal Protection Act is unclear about the disposition of stranded animals and this should be clarified.

Sixth, the Marine Mammal Protection Act should be amended to prohibit invasive and lethal research on marine mammals unless it will directly benefit the species in the wild. We believe that the killing of healthy marine mammals in scientific studies and invasive experiments are justified only under a limited set of circumstances and when no alternative exists.

We again direct the Committee to the Bilirakis bill which contains language addressing this issue.

In conclusion, Mr. Chairman, I want to support Fish and Wildlife Director Mollie Beattie and express our support for an amendment which would strongly support habitat preservation.

And last, I would like to bring to the Committee's attention a publication which we have put out entitled "Small Whale Species, the Case Against Captivity." We will make that available to you, Mr. Chairman for the record and to the other members. Thank you.

[Statement of Dr. Grandy can be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, sir. Mr. Pungowiyi and Dr. Tyack, at the request of Congressman Young's staff—they are trying to locate him, which should not be hard, he is quite large—we are going to reverse the order of the last two witnesses if that is OK, so that he might have a chance to get back to hear his constituent from Alaska. And we will now go to my constituent, Dr. Peter Tyack, from the Woods Hole Oceanographic Institution. Dr. Tyack.

STATEMENT OF DR. PETER TYACK, RESEARCH ASSOCIATE, WOODS HOLE OCEANOGRAPHIC INSTITUTION

Dr. TYACK. Mr. Chairman and members of the Committee, I would like to both thank you and the snowplows of Logan Airport for this opportunity to appear before you this morning.

My name is Peter Tyack and I am a biologist on the scientific staff at the Woods Hole Oceanographic Institution, a private nonprofit institution for research and education in oceanography.

For the past two decades, I have studied the acoustic communication and social behavior of whales and dolphins. Conservation biology is not my profession, but I hope that I can contribute an independent scientific perspective.

Marine mammal populations in U.S. waters are primarily threatened by unintentional effects of human activities. Overfishing may deplete marine mammal prey enough to reduce the carrying capacity of the environment. Chemical and noise pollution degrade the quality of marine mammal habitats. Ships and fishing gear kill or injure marine mammals by accident. Ironically, NMFS has imposed tougher controls on scientists working to benefit these animals than on these more important problems.

This regulatory focus on scientific research is completely out of balance with the relative risk these activities pose to marine mammals.

Let me give an example from the most endangered baleen whale, the northern right whale. Most of the 300 or so right whales left in the western North Atlantic carry scars from vessel collision or entanglement with fishing gear, and more adults die from vessel collision and net entanglement than any other known causes.

Under current regulations, there are no preventive controls on ships or fishing gear most likely to kill or injure the last remaining right whales. In contrast, more and more controls are being placed on the scientists who document these problems.

A group of biologists on Cape Cod risk their own lives to save entangled whales. Since they approach whales closely, NMFS required them to obtain permission to take these whales by harassment. The permit took a year to be issued.

If the scientists had not continued to rescue whales illegally during this year, whales might have died from the lethal combination of lax regulation of fisheries combined with over-regulation of the rescues.

How did this policy go so wrong? The Marine Mammal Protection Act of 1972 banned any taking of marine mammals. For commercial fisheries, take is usually construed as killing or injuring. However, when a scientist asks for a research permit, take has been defined to include minor behavioral reactions of negligible impact.

NMFS devotes a significant fraction of its regulatory effort tracking these research permits, treating people who photograph an animal with similar rules as those who shoot one.

Another example may illuminate the problems of this double standard. Extensive research shows that whales are disturbed by loud ships when they are many miles away. These results suggest that under current regulations, each ship takes thousands of marine mammals a year by harassment. If commercial ships operated under the same rules as research, they could seldom leave the harbor.

There is a critical need to redefine "take" in the Marine Mammal Protection Act in a way that focuses effort based upon magnitude of risk to animal populations. I support separating takes into three different risk categories, one involving predictable death or injury, a second involving potential harm, and a third involving negligible impact.

Given the past regulatory history, it may be important to *require* regulators to control the most dangerous takes before committing resources to insignificant ones.

The purpose of permits for scientific research under the MMPA was to allow scientific activities that would otherwise be prohibited. The current permit process for scientific research is not inappropriate for the rare requests for lethal or injurious research. However, I do not support requiring permits for research activities that have negligible impact.

The Marine Mammal Protection Act should be amended to allow a general authorization for these research activities.

It is less clear how to regulate research activities with an unknown potential to harm or harass animals. And I would have to emphasize that we have profound ignorance of some of these impacts now. However, I do not believe that regulating individual acts of non-injurious takes is appropriate.

The impact of harassment and disturbance on populations depends upon cumulative impacts which are a form of habitat degradation. I believe they are better regulated as habitat management problems than by attempting to regulate individual acts.

Marine mammal protection will be better served by redirecting resources from extensive permitting of trivial research takes to stock assessment and conservation plans with some enforcement power.

The Marine Mammal Protection Act must be updated from regulating the lethal takes of the whaling era to an era where a broad array of unintentional impacts threaten marine mammals and the ecosystems upon which they depend. Thank you.

[Statement of Dr. Peter Tyack can be found at the end of the hearing.]

Mr. STUDDS. Thank you very much. Needless to say, Dr. Foster, we are shocked. Shocked. I assume—I have to assume—it is lawyers in your midst that are responsible for this activity. I, myself, have spoken personally with the whales referred to by Dr. Tyack, and they are in full concurrence. And as a matter of fact, they have suggested we put the lawyers out there to examine who is harassing whom. Anyway, the purpose of our switch has occurred and it is a pleasure now to recognize Mr. Caleb Pungowiyi, President of the Inuit Circumpolar Conference. Mr. Pungowiyi.

STATEMENT OF CALEB PUNGOWIYI, PRESIDENT, INUIT CIRCUMPOLAR CONFERENCE

Mr. PUNGOWIYI. Thank you, Mr. Chairman and members of the Committee and ladies and gentlemen. My name is Caleb Pungowiyi. I am president of the Inuit Circumpolar Conference, an international organization representing the Inuits of Canada and Greenland, Alaska and Russia.

My testimony today is on behalf of Alaska natives and our brothers in Russia, Canada and Greenland. The encroachment of civilization has not been kind to our people. From the days of the Russian fur trade, the Yankee whalers and the Gold Rush days, we have suffered tremendous social injustices and hardship. Many of our people have died from starvation, mistreatment and diseases.

My mother's family were the sole survivors from the village of 350 people who died of mass starvation. It occurred on St. Lawrence Island in the late 1880's. I remember my grandmother telling us of leaving the bodies where they lay because they were too weak to give them proper burial, and the reason I bring this up is because the exploitation of resources and the hardship it caused our people is just in recent history.

And we have no intention of seeing the marine mammals decimated in a way that it hurts our people. Like the Canadian people, we have managed our resources and our use of marine mammals through our own cultural rules. And these rules have been successful for hundreds of years. And we continue to abide by them today.

I believe that the exemption in the Marine Mammal Act is the Congress's recognition of the strength and value of native cultural management of marine mammals.

Since the enactment of the Marine Mammal Act, we have made the protection of the native exemption our priority. The exemption is not without its fault and there is probably no other law or policy in the modern world that restricts the economic activity of a group of people to handmade items and also restricts the sale of products only to its own people.

It is as if our people live in the fishbowl and every action we take is watched by the world community and every mistake made by our members is magnified beyond its proportion.

The suggestion made to you today by the Fish and Wildlife Service is an example of why we feel that way. The native exemption has worked well but Fish and Wildlife does not seem to understand that.

We have come to you today with what we see as practically unnecessary and unacceptable changes to the native exemption.

There is no problem in the definition of handicraft and we currently have full legal authority to interpret the undefined terms of the statutes.

The mention of sales of gallbladders and male organs is something that they have not communicated to us as a concern and if they are aware of illegal sales, then Fish and Wildlife should enforce the ban of these sales, rather than bring it to the public as a problem.

There are currently a number of excellent vehicles for working within the native community. These commissions were formed for the purpose of protecting the uses of marine mammals. The emphasis was to respond to situations that threaten our subsistence lifestyle and to show that we are genuinely concerned about the conservation of marine mammals.

In 1977, the Alaska Eskimo Whaling Commission was formed in response to an international effort to ban the subsistence harvest of bowhead whales. The Alaska Eskimo Whaling Commission is now seen as an example of the native community's ability to organize for species management, conduct and develop scientific research, and implement self-management.

The Eskimo Walrus Commission was formed in 1978 in response to the State of Alaska's efforts to manage walrus. It is in these and other efforts that we have consistently made efforts to assist the agencies to improve the knowledge of the species, to monitor the native take, and to avoid waste.

I believe that the cooperation with native communities is necessary to ensure the conservation of marine mammals. It is only if the Alaskan natives have a stake in research regulation and enforcement that the management action can be effective.

It is our experience with the U.S. Fish and Wildlife Service, however, that cooperation is more an exception than the rule. The suggestions made by the Director today were never discussed with the native community before.

Again, the key is cooperation and the best model of that is comanagement, where there is a genuine sharing of power and responsibility over all forms of management.

The service—excuse me—am I out of time?

Mr. STUDDS. We have a certain degree of flexibility when dealing with people from southeastern Massachusetts and Alaska. We understand that you have traveled a very great distance and of course Dr. Tyack has traveled an equal distance when you talk about virtual distance, so please take an extra couple of minutes.

Mr. PUNGOWIYI. Thank you, sir. The Service has made some great strides in this direction with respect to migratory birds. The

government should follow suit with respect to marine mammals as well.

Therefore, we request amendments in the Marine Mammal Protection Act to give us the vehicles for co-management in research regulation, monitoring and enforcement.

Two of the points I would like to make about the Marine Mammal Protection Act with respect to native use of marine mammals. First, I urge the Congress not to depart from the current tools for measuring the health of the species.

I am particularly concerned with the language in the latest House draft which would create a new category of "critical". And would set allowable levels of take through the enactment of so-called PBR, potential biological removals. The Alaskan native community feels that these are not necessary to resolve the issue of illegal take of marine mammals by commercial fisherman.

While strictly speaking this is not an issue of this hearing, we feel strongly enough that I should mention it. The second point I would like to make concerns the importation of marine mammal parts into the United States. At the present time, if I take a parka to Canada with the polar bear ruff, I cannot bring it back home.

My cousins (by the way I have relatives in Russia), cannot wear their sealskin boots when they come over to visit me.

I thank the Committee for the draft bill that properly fixes this situation. I would like to request further that the law allow importation of native handicrafts by tourists who travel into Russia, Greenland and Canada. Such importation would be allowed only if the other country of visit has a protective law like MMPA in place and be consistent with section 11(b) of the Marine Mammal Protection Act.

Alaskan natives and the natives in those other countries have few sources of income and the sale of handicrafts is as important to them as it is to us.

As I said when I started, the threat of survival of the marine mammals does not and will not come from the native community. It will come from those activities and actions of the industrialized world. There is currently clear evidence of accumulation of heavy metals, PCB's, DDT, and other organic compounds in the organs and fat tissues of marine mammals.

The native people are probably the only people in the world where the health authorities and research scientists have recommended the continued consumption of contaminated food because there are little or no other alternatives. The industrialized world is not ready to reduce its emission of pollutants into the environment. And we would ask that Congress direct the public health and Federal agencies to investigate the levels of contamination and the risk to human health.

I appreciate this opportunity to testify. I would be happy to answer any questions. Thank you.

[Statement of Mr. Pungowiyi can be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, sir. Now, as I have said, we are going to apply the five-minute rule to ourselves as well. Dr. Tyack, now that we have resolved the problem of the harassment of scientists, at least I think we have, I would like to hear a little

bit more about your observations on the cumulative impacts of habitat degradation on marine mammals. As you know, in our own State we are dealing with this issue right now as we look at how to monitor the potential cumulative effects of disposal of dredge materials and discharge of sewage effluent into what are very vital feeding grounds for endangered whales. You seem to indicate that we should go beyond the normal pollution issues and perhaps even beyond our new program which we are going to call swim-with-the-lawyers, I think. What should we be thinking about here?

Dr. TYACK. I do think it demands a new way of thinking. Most of the enforcement of the Marine Mammal Protection Act has exclusively concerned individual takes of animals. There has been remarkably little thought put toward the combined effects of all human activities on these animals. And that is going to take a reorientation of effort.

Unfortunately, for chemical and noise pollution, we have such profound ignorance, I don't think that it is possible to make good regulatory decisions. The Office of Naval Resource has launched an ambitious new program to look at the impact of noise on these animals. That has not received much public attention but is one of potential concern.

Chemical pollution requires an equally concerted effort on the part of some Federal agency to bring us answers so that it will be possible to make cost and benefit decisions. Right now we simply can't say what the impacts to marine mammals are of these heavy toxic loads that Mr. Pungowiyi just talked about.

I think that there are, however, several different issues that are much more obvious. The constant threat of vessel collision is obviously dangerous to animals, and the primary need here is simply enforcement of existing laws. For right whales in the southern Gulf of Maine, one of the primary issues to their survival, one of the primary habitat degradation issues, is this presence of vessels which collide with them and kill so many individuals. This problem has not been addressed by the National Marine Fisheries Service.

Just as important as vessel collision, are the potential effects of overfishing of marine mammal prey in reducing the carrying capacity of the habitat. I think protection against this kind of risk would require allocating quotas of food for marine mammals when fishing quotas are allocated. This will not be an easy task. But I think that if Congress is serious about enhancing the recovery of marine mammals, it would do better to decrease the effort on trying to regulate every individual take of an animal, even if it is trivial, and pay much more attention to targeting the most serious problems facing each marine mammal population. For each particular population I don't think that it is an impossible task even now to assess which of the following problems are of primary concern: chemical pollution, overfishing, entanglement in fishing gear, vessel collision, or noise pollution. What is required is a process that demands weighing all these impacts.

Mr. STUDDS. I don't suppose I should ask you about the impact of an eighteen and a half foot vessel commanded by a member of this Committee, so I won't. Thank you very much. I hope the airport reopens sometime this fiscal year. The gentleman from New Jersey.

Mr. SAXTON. Thank you, Mr. Chairman. I apologize for having been out of the room much of the time that you all were giving your testimony, but in my opening statement I raised some questions and I would just like to ask this question of whoever might want to respond. I suspect that Dr. Foster or Ms. Beattie would like to respond to these questions. The question has to do with the regulations that were proposed last October that had to do with the subject of a $10,000 surety bond or whatever other arrangements one might make with regard to each animal in the care of a facility. It has to do with seemingly extensive review and intricate permit applications that many people see as unnecessary and overreaching, and it has to do with the industry requirement to pay for the government's writing of environmental assessments and environmental impact statements. So I guess I have basically three questions. Why are these regulations necessary? In other words, justify them. Why are they not overreaching? And how are we going to pay for them?

Dr. FOSTER. I think I win the lottery this time. Those are the National Marine Fisheries Service's proposed rules. Let us start with the idea of the surety bond. First of all I should say that we are not bound and determined and wedded to a $10,000 surety bond. What we are trying to get at is a problem that we have faced in two serious situations, at least, in the past few years and we see this as having the potential to happen more often in the future. And that is when a facility for one reason or another closes or goes bankrupt, what happens to the animals in that facility? Because we grant the permit to hold these animals, the public holds us accountable for what happens to these animals. And in point of fact, this is a classic example of one of the differences between the Animal Welfare Act and the MMPA.

When a facility loses a license, then APHIS responsibility goes away. And so without the MMPA there would be no care for these animals. What we see as a real problem is that we can't think of any good reason why the public taxpayer should have to pay for the care and transport of these animals while we are working with the public display community to find a place for them.

Our proposal is a way of ensuring that really marginal facilities find it more difficult to get the animals but even more important than that, that there is some funding to take care of them when some facilities fail. We have imposed on friends in the public display community; we have imposed on the Marine Mammal Center in California at their own expense to take these animals. The New England Aquarium incurred a tremendous expense taking animals from a facility that went down.

And that is the rationale behind the idea of the surety bond.

Mr. SAXTON. May I beg your indulgence to interrupt you just so that I understand the scope of the problem that you are trying to deal with here. Because I really don't. How often is it that one of these bankruptcies or going out of business occurs, is it something that happens every year, every week, every month, once in a while, really often, and thereby what kind of a problem is it really?

Dr. FOSTER. I think over the past 4 years we have seen it happen twice. But if you happen to be the New England Aquarium, it only needs to happen once. We have invoices from that Aquarium that

totaled something like $100,000 just for this one instance. And I think it is important to note that while the Alliance of Marine Mammal Parks and Aquariums and the American Association of Zoological Parks and Aquariums (AAZPA) do have an arrangement where they are in a sense self-regulating (i.e. they have an agreement that they will take care of each other's animals), you have to remember that those two groups, as far as we can tell, cover only about 60 percent of the facilities out there that are holding marine mammals. That means that 40 percent of the facilities are not covered. You would assume that the facilities that are members of these two organizations are the best and are not likely to be irresponsible or in danger of bankruptcy. The 40% who are don't have the same backup.

Mr. SAXTON. I realize that I am almost out of time, so let me just ask Mr. Jenkins if he would like to comment before I run out of time.

Mr. JENKINS. Congressman, we do not believe that there is any need for a surety bond or any similar arrangement to provide for these animals. As Dr. Foster indicated, on both occasions it was members of the marine mammal public display community that stepped in and in a sense if you would, rescued, found new homes and transported those animals to those homes at their own expense. This is an obligation that we in the Alliance and the AZA take very deeply. It is an indication of the animal care and the level of commitment that we make to the animals that are in our collections. We are prepared to continue doing this in the future. Because of that, we do not see any need for a surety bond or any similar arrangement.

Mr. SAXTON. Mr. Chairman, may I just to finish, ask anybody who may want to respond what the cost of such a surety bond might be? I don't know.

Mr. STUDDS. Preferably in numbers rather than words.

Mr. JENKINS. Excuse me, I can find that out, just a minute. According to a cost analysis that we did on the regulations that were published in October, it would cost $500 without collateral.

Mr. STUDDS. I thank the gentleman. The gentleman from Alaska.

Mr. YOUNG. Thank you, Mr. Chairman. I will pursue the question that Mr. Saxton began to ask at a later date, but Mollie, I have some questions for you. You mentioned several proposals that you are developing that would relate to the marine mammals in Alaska. I have a copy of the Marine Mammal bill as prepared by the U.S. Fish and Wildlife Service in Alaska which refers to these topics. Are these the proposals that you are suggesting?

Ms. BEATTIE. I don't know what document you have, Congressman. Our proposed amendments have not been finalized out of the Department of the Interior.

Mr. YOUNG. You have not seen anything from the Alaska region of the Fish and Wildlife Service?

Ms. BEATTIE. No, I have not.

Mr. YOUNG. Well, someone is not communicating then. Second, you state the marine mammal populations in Alaska are healthy, you state you want to work with the Alaska natives; you just heard Caleb say that you had not communicated with him on your suggestions. Then you go on to ask for new authority to develop sub-

sistence regulation which is none of your business, before a marine mammal stock is declared depleted. If the stocks are in good shape and the native community is jointly managing them, there is no need for the authority. Why are you asking for new authority to regulate subsistence?

Ms. BEATTIE. We are not asking for new authority and I was reading very fast so let me go over it slowly. We believe that the way the law works now is substantially good. It does leave us in a position of finding ourselves, if we are headed toward depletion, of only having authority to develop regulations once we hit that point. We have to go through a formal rulemaking process at that point. It may be one or two years past the point the species has hit depletion. We are not proposing additional authority. Our proposal is not to apply the regulations any earlier than they would be applied now, but only to have authority to begin to develop them. We would of course begin to develop them with the involvement of native people. A couple of things I did not get to talk about because of the time limit were also a proposal we have to increase our grants and give grants to native organizations for the study and management of marine mammals. And I would hope that those kinds of mechanisms, with which we have great success, would come into play.

Mr. YOUNG. Well, my concern is that under your proposal—I am reading your—by the way, your answer and your written testimony are not exactly the same, so I would suggest you review that very closely. Why should Alaskan natives suffer under a minimum six years of Federal management if the stock is found to be depleted? What gave you the magic number of six years? Where did that come from?

Ms. BEATTIE. I am not sure where it came from but I think it is a time of review and monitoring that people——

Mr. YOUNG. In the meantime, as I said, I don't believe you have any business being in subsistence. Period. I want you to know that. If I have my way you are not going to be involved in it. But the second thing is why do you want to ban the sale of oosicks?

Ms. BEATTIE. Ban the sale of oosicks?

Mr. YOUNG. Yes, do you know what an oosick is?

Ms. BEATTIE. Yes, I do. Our proposal is——

Mr. YOUNG. For the audience, this is an oosick. This is an oosick. Now, why do you want to ban the sale of this when only 3,000 walruses are being taken today, part of the subsistence provision. This is part of craft from an animal. You prefer them to throw it away?

Ms. BEATTIE. No, sir. We are not proposing the banning of it. The question was should these be considered handicrafts if they are not worked, if they have not been handcrafted in any way.

Mr. YOUNG. Well, has this been worked?

Ms. BEATTIE. I believe if it has simply been polished, we would say no. If it had been carved and otherwise decorated, we would say yes.

Mr. YOUNG. But the difference is—what is wrong with having this as part of the subsistence? Do you know of any case where the walrus is being killed for the oosick?

Ms. BEATTIE. I don't know, Congressman. But what we are saying is that in order to be considered a handicraft, it should be worked. We are not proposing to ban the sale of oosicks.

Mr. YOUNG. Well, if we put a knob on the end of it, is that considered work?

Ms. BEATTIE. I don't know technically, sir.

Mr. YOUNG. See, that is the problem. Now this is a government agency, getting involved in something they have no business being involved in. This is not being misused.

Ms. BEATTIE. Congressman——

Mr. YOUNG. This is the thing I don't get. That is exactly right. The only thing you suggest——

Ms. BEATTIE. May I address your question?

Mr. YOUNG. You suggest the courts rule—wait a minute—the courts have ruled on an issue that can be considered what are native handicrafts. The courts have already ruled on this. And why are you and the agency—you know, I am hostile, not necessarily to you, but the agency. This is an example of the agency stepping out of bounds. Why are you trying to overturn the court rulings of what are native handicrafts?

Ms. BEATTIE. Our interpretation of the court ruling, Congressman, was that the standards in the Marine Mammal Protection Act are not clear and are in need of clarification. And that is our intent.

Mr. YOUNG. But you lost the case. Did you not?

Ms. BEATTIE. Yes, on the basis——

Mr. YOUNG. So you want to change—after the court case you want to change it to fit your shoe?

Ms. BEATTIE. Congressman, we are saying that we would like to clarify something that we believe the court found to be unclear.

Mr. YOUNG. You want to clarify it in your favor and against the natives. And yet you say you want to work with the natives. Because that is my problem. You lost the case. You are proposing change in the regulations so it fits your situation, not the natives. The natives won that case. Is that correct?

Ms. BEATTIE. We are just simply preparing to clarify the definition of native handicraft, Congressman.

Mr. YOUNG. And that has already been decided by the courts. Mr. Chairman, I suggest respectfully that in this case the courts are correct. And last, in your statement, Mollie, you state that the polar bear has been taken by aircraft. Now, you have evidence of that?

Ms. BEATTIE. We have some small evidence. It is not a major problem, but we believe that this proposal, which is to restrict the hunting of polar bears with aircraft and large motorized vessels, is in keeping with the International Polar Bear Agreement.

Mr. YOUNG. But you don't have any evidence? If you have, you should be prosecuting, is that correct? You are talking about subsistence taking. Now, we are not talking about abandonment or poaching, we are talking about subsistence taking?

Ms. BEATTIE. That is true. We would, of course, exempt skin boats, but we are simply talking about aircraft and large motorized vessels.

Mr. YOUNG. What is a motorized vessel?

Ms. BEATTIE. It would be defined by rule that it would be quite a large—quite a large motorized vessel.

Mr. STUDDS. The gentleman's time has expired. Ms. Beattie——

Mr. YOUNG. Thank you, Mr. Chairman. I would like to rule out this oosick later on to find out why you feel this can't be sold, it has been manufactured, it has been proven, and by the way, you can use it as a weapon.

Mr. STUDDS. Did I violate the law when one of your cagey constituents sold me one of those things the last time I was there?

Mr. YOUNG. That is what they want to say is violating the law. And my point is they killed 3,000 walruses at the maximum for subsistence purposes. And to have this proposed by an agency is deplorable to me.

Mr. STUDDS. Ms. Beattie, you may not believe this but this is one of his relatively mellow days.

Ms. BEATTIE. Fortunately, it is one of mine too.

Mr. STUDDS. It is just as well.

Mr. YOUNG. Now, if we want to get in a real discussion young lady, we will. And if you want to start this, we will. You just remember where I am and where you are.

Mr. STUDDS. The usick will go. Oosick, whatever it is. Actually it looks more like an oosick in your hands. The gentleman from California is next.

Mr. CUNNINGHAM. Thank you, Mr. Chairman. And I would like to say to Mr. Pungowiyi, although you read your words I know they came from your heart, and I understand the emotion. And in clarity of time I would like to submit most of mine for the record, Mr. Chairman.

[Statement of Mr. Cunningham follows:]

STATEMENT OF HON. RANDY "DUKE" CUNNINGHAM, A U.S. REPRESENTATIVE FROM CALIFORNIA

I would like to thank Chairman Studds for holding this important hearing on the reauthorization of the Marine Mammal Protection Act (MMPA).

Since the MMPA was enacted in 1972, it has served to protect various marine mammal populations in the wild from various human threats. The Act also safeguards marine mammals by managing human activities affecting them and their natural habitat.

Through the years, however, much confusion has developed over what role each agency should play. Most recently, this confusion was demonstrated in October when the National Marine Fisheries Service issued their proposed permit regulations. I believe that in the future this ambiguity will certainly lead to more conflicting standards and law suits.

It is my understanding that the intent of the MMPA was to protect marine mammals that lived in the wild, and that the National Marine Fisheries Service and the U.S. Fish and Wildlife Service are responsible for its enforcement. It was also my understanding that the Animal Welfare Act, enforced by the Department of Agriculture's Animal and Plant Health Inspection Service, regulates the care and maintenance of marine mammals in zoological facilities.

Mr. Chairman, as we discuss the issue of public display, it is imperative that we make this less of a "regulatory mess". As a Member from San Diego, I am proud to have both Sea World and the San Diego Zoo close to me, and the San Diego Wild Animal Park in my district.

This Committee should note the important role played by zoos and aquariums. These zoological institutions have spent $20 million on research over the past 5 years alone. This research, performed at no expense to the Federal Government, benefits marine mammals in the wild and in captivity. These same institutions have spent over $5 million since 1987 rescuing and rehabilitating stranded marine mammals—again at no cost to the Federal Government.

It is important to keep in mind the benefits derived from the zoological community's education, research, rescue, rehabilitation, and care and maintenance efforts to protect marine mammals and their habitat. The great service that the zoological community provides in these areas should be recognized and should not be discouraged by unnecessary and burdensome regulations. Such a burden could result in a decision by the scientific and zoological community to scale back research and rescue efforts, thus requiring additional resources from the Federal Government.

Mr. Chairman, as we learn more about marine mammals both in the wild and in captivity, let's be sure to strengthen Congress' original intent that the National Marine Fisheries Service has and should maintain the authority to issue permits for "takes" from the wild and for the importation of marine mammals or marine mammal parts from the wild and for the importation of marine mammals or marine mammal parts from a foreign country. The term "take" should be explicitly clarified to include only activities in the wild or affecting a marine mammal's natural habitat.

Again, thank you for holding this hearing today. I look forward to working with you on this important issue.

Mr. CUNNINGHAM. But Dr. Foster, you stated you worked for over 20 years with the other regulatory agencies. Mr. Jenkins and others object to the intrusion and request that this Committee clarifies the lines of jurisdiction. And I know whether it is Republican or Democrat or CIA or FBI or Border Patrol or INS, there is always a struggle for power and dominance within different organizations. And I think in any of those instances and this one too where that thrust for power or control is detrimental to what we want to do in especially the Marine Mammal Protection Act, I think that is where we need to step in and separate the pepper.

I used to date a young lady that worked at Sea World. Unfortunately, she was more interested in the animals than she was in me and she phased me out. But during that timeframe, I know the care and the love, I know the veterinarians, I talked to some other members up in the Seattle area, I know the care and the love that these animals get and I understand, you know, some of the problems.

But I think, and I would hope with the Chairman and this Committee that we can look at some kind of compromise in this thing because what we are all interested in, I think, is the protection of these animals. I was going to ask you the questions about the amount of $500, is that per animal or is that total?

Mr. JENKINS. That is per animal, per activity, such as a transport. Every time we would move an animal, for example, within the context of our breeding loan agreements, we would have to put up a surety bond for the transport of that animal.

Mr. CUNNINGHAM. OK. It seems that it is the private industry that provides, like you said when you had your problems, they come in and step in, they feel a responsibility. But maybe even all of those groups together across the United States and this Committee could look into it, Mr. Chairman, as forming some kind of alliance to where the actual industry doesn't have to take care of it themselves, but maybe an alliance would have a way to provide funds, you know, to take care of these problems and step in. And I would hope in a responsible way that this is the way the agencies would step forward and do this. But I know the value—this Saturday we have an event called Game 24, which kids in an education program are having at Sea World, in our zoo in San Diego and if I was a critter I would rather be there than out in the open ocean because of the care and love that they get there. I thank all the

participants and I thank Mr. Pungowiyi, you touched my heart with your testimony and hopefully we can take care of some of these problems. Thank you and thank you, Mr. Chairman.

Mr. STUDDS. Say to the gentleman we are all critters. Important to remember.

Mr. CUNNINGHAM. Only these Republicans, Mr. Chairman.

Mr. STUDDS. I repeat. It may also reassure the gentleman that it is our intention and the fashion of this Committee to try to resolve these matters by compromise and I am very hopeful that we can. The gentleman from Maryland.

Mr. GILCHREST. Thank you, Mr. Chairman. I would just like to quickly make a comment to public displays, the Baltimore Aquarium and other aquariums around the country. I am not familiar with other aquariums around the country, but in my estimation after visiting the aquarium in Baltimore, it is a beautiful research facility that allows the people of this mid-Atlantic region to understand the importance of conservation and where we fit in with other life forms on this planet. So however this bill—however it moves through this Committee, and however we shape and form it and decide on the final draft, I would like to make a comment that the facility in Baltimore, and I am sure there are other facilities around the country, offer the average individual an opportunity to understand the absolute essential importance of where we fit in with the rest of the life on the planet. And so, Mr. Jenkins, I will work very diligently with this Committee to ensure that your facility continues to do what it does.

I would like to ask some other questions, mainly related to this oosick. I didn't know what an oosick was—it looks like quite an amazing thing. I am not sure how to pronounce everybody's name but——

Mr. CUNNINGHAM. That is an assault oosick.

Mr. GILCHREST. Well, it might be a semi-assault oosick. It is hard to tell. There have been a lot of words exchanged here between different groups of people and agencies on the part of—it seems to me, sitting here in an observation mode that just about everybody in this room is talking about the same thing. Whether it is Fish and Wildlife trying to preserve the number of walruses that carry these oosicks or whether it is the indigenous proud people of the northern regions of Alaska, Russia and Canada, trying to preserve their dignity and integrity by pursuing a responsible lifestyle.

And if we could understand that I am sure the gentleman from Alaska would not want to see the walruses become endangered or extinct, and that they have lived with walruses and polar bears and other species for 10,000 years, so their relationship is firmly set in tradition.

I would hope that we can pass some fashion regulation that will not create controversy between this government and the peoples of Alaska, but create an opportunity so that we can see that there is room for flexibility and room to work.

I would like to ask, and I truly apologize Mr.?

Mr. PUNGOWIYI. Pungowiyi.

Mr. GILCHREST. Pungowiyi. Mr. Pungowiyi. Who buys these things? When you catch a walrus and you are going to sell something like this, who would buy it and what is your difference of

opinion with Ms. Beattie as to why this thing should be carved a little bit so it looks like it has been fashioned? Is there a disagreement with that and why?

Mr. PUNGOWIYI. Well, the people that buy them, people who are curious, you know, about the walrus oosick (mostly it is tourists who come up to Alaska). Also the handcrafted ones are the ones where you carve out of ivory either a walrus head or a polar bear head and attach it to one end of the oosick and then on the other end is the flippers or some other ornament, you know, in essence that makes it look attractive. I think that the Fish and Wildlife, if I understand their proposed amendment, indicates that they were more concerned about the sale of male organs and gallbladders in an unfinished raw form that would be used for aphrodisiacs in the Asian countries.

Mr. GILCHREST. Do you have a concern that—do you understand that they want to preserve the walruses?

Mr. PUNGOWIYI. That is correct.

Mr. GILCHREST. And do you have some concern yourself about those particular body parts as far as somewhere down the line someone abusing, let us say some Asian countries coming in and having a big market for types of body parts. Is that a potential problem?

Mr. PUNGOWIYI. If it was something that would come to our attention, it would be something that we bring to the attention of Fish and Wildlife. We have worked with them in terms of, if we feel that there is an illegal activity that is of concern to the native community, we will bring it to their attention. And as I mentioned, the Act is very restrictive in terms of how it treats the Alaskan natives, and what we can do and how we can do it with the products. And I think that the Fish and Wildlife anticipates or envisions a problem that is nonexistent. And they have not, and we have not—it is my opinion or my knowledge, there has been no activity that has surfaced concerning either the sale of oosicks in an unrefined form or sale of gallbladders to the Asian countries. And, you know, if they were concerned, I would assume that they would approach us and tell us hey, we see this as something that is a potential problem, let us work it out. That has not occurred. This is the first time we heard today that they feel that there is a concern on sale of gallbladders and male reproductive organs.

Mr. GILCHREST. Could Ms. Beattie just respond briefly?

Ms. BEATTIE. I can respond that we are really trying, once again, to clarify the definition of edible portion in the law as it is now, and trying to stop what we believe is beginning to be a substantial black market in these products for the Asian market. All it does is try to define essentially edible portions as those traditionally consumed by native peoples, and take out this sort of burgeoning interest in gallbladders, which I am sure most of you have been reading about, in the Asian market.

Mr. GILCHREST. It seems that the gentleman from Alaska wants to preserve the integrity of his people and their rights, but I am sure he would also agree he wants to work with the Fish and Wildlife to prevent a black market from occurring.

Ms. BEATTIE. And we would agree to that too.

Mr. GILCHREST. I guess communication is the art of success and thank you for your testimony.

Ms. BEATTIE. Thank you.

[The statement of Mr. Gilchrest follows:]

STATEMENT OF HON. WAYNE T. GILCHREST, A U.S. REPRESENTATIVE FROM MARYLAND

I wish to commend the Chairman for calling this hearing and welcome this opportunity to hear the testimony today.

The Marine Mammal Protection Act is the world's premiere legislation, protecting marine mammals and their natural habitats. I am confident that the Act will receive the continued support of this Committee that it so deserves.

When the Act was first passed, we granted a special, favored status to zoological institutions that display marine mammals to the public in recognition of their important role in educating the public, a vital goal of the Act. A similar status was granted to those engaged in scientific research on marine mammals in recognition of their contributions to marine mammal science and conservation. The importance that public display and scientific research have made in furthering the purposes and goals of the Act cannot be underestimated. A facility located in my own State serves as an excellent example of the vital role that these institutions play in supporting the Act, and the life and development of their communities and States.

The National Aquarium in Baltimore is a world-class aquatic facility. Its primary goal, as expressed in its mission statement, is to create in every visitor an attitude of respect for the environment and the ecological balance of life. This is accomplished by providing quality educational and recreational experiences at all levels that adhere to the highest principles of animal care, conservation and scientific research. The Aquarium is Maryland's most popular cultural attraction, enjoying an average visitation of over 1.5 million visitors each year since its opening in 1981.

Showcasing the majesty of all marine mammals, the Aquarium opened its Marine Mammal Pavilion in 1990. The 94,000 square foot, $35 million Pavilion combines live and participatory exhibitry to tell the real story of marine mammals around the world. From the life-sized model of an actual humpback whale to the interactive exhibits in Exploration Station, visitors learn in meaningful, lasting ways about wild marine mammals, their unique adaptations to life in the water, and the current threats to their existence.

The centerpiece of the Pavilion is the Lyn Meyerhoff Amphitheater encompassing the dolphin facility. This is a 1.2 million-gallon environment housing Atlantic bottlenose dolphins. Surrounding the environment are the world's largest acrylic windows providing visitors with an unprecedented look into the world of the dolphin. Public presentations focus on marine mammal adaptations and life beneath the waves. Specially produced video and animation displayed on two, large technically advanced screens, punctuates the demonstrations with intimate footage of wild marine mammals and their unique characteristics. These presentations are accentuated with a strong conservation message focusing on the need to protect both the aquatic environment and the marine mammals that live there.

To fulfill its goal to provide a quality educational experience, the Aquarium maintains a large Education and Interpretation Department with a professional staff experienced in the areas of public programs, curriculum development, resource materials, administration and grants, and professional communications. Educational services are provided to the general public, Aquarium members and the tens of thousands of school children who enter its doors each year. They are also offered directly to individuals and organizations with local, national and international law. In 1991 alone, over 254,000 individuals at all levels, including outreach and training programs, participated in specific educational programs. In 1993, a record 157,000 school children visited the Aquarium with many participating in formal classroom experiences. Some of these programs focused specifically on marine mammals and their unique roles in the aquatic environment. Additionally, over 2,000 teachers participated in aquarium teacher orientation, workshops and other teacher training programs, who then took their new and expanded skills back to their classrooms.

As with the other members of its living collections, the Aquarium provides the marine mammals in its trust with the very best in husbandry, nutrition, medical, and environmental care. The high level of care by the professional staff is evidenced by the successful births of two bottlenose dolphins one year after opening the facility. Both calves will celebrate their second birthday in one month. The Aquarium also has second-generation captive-born harbor seals in its seal colony. The Aquarium is an active member of the AZA Marine Mammal Taxonomic Advisory Group

and participants in the breeding programs for harbor seals, bottlenose dolphins and beluga whales.

Basic and applied scientific research bolsters the animal care and husbandry programs of the Aquarium. Studies have been conducted on the anatomy of sea otters, ocular segment disease in wild fur seals, the vocal behavior of beluga whales, the chemical composition of dolphin tear secretions, and the circulating levels of hormones in beluga whales. Scientists working with the Aquarium have authored nearly 100 peer-reviewed studies since its opening in 1981. These studies have application both to captive and wild populations, and to marine mammal rehabilitation programs.

The Aquarium is an active member of the Northeast Region Marine Mammal Stranding Network and is responsible for coordinating the rescue and care of stranded marine mammals and sea turtles in the coastal areas of Virginia, Maryland, and Delaware. Aquarium Stranding Network workers respond to calls 24 hours a day to care for sick or injured wild animals. Assisting the professional Aquarium medical staff are specially-trained paid and volunteer Aquarium staff members. Collection of valuable data is one of the additional benefits of the Stranding Network.

This program is funded entirely through public donations and the operating revenues of the Aquarium. The costs of the program can be significant. For example, the attempted rehabilitation of a juvenile pilot whale in 1992 required the use of over $47,000 in Aquarium resources. Currently, the Aquarium annually expends over $100,000 in combined resources towards the rehabilitation of wild animals rescued through the Network. As I speak, they are rehabilitating a dwarf sperm whale that was stranded just before Thanksgiving of last year. I note that significant amounts of plastic debris were found in the whale's stomach. As involvement and public awareness expands, greater demands will be placed on the Network, thus the dedication of additional resources will similarly increase.

Mr. Chairman, I note that the Aquarium is but one of the many institutions throughout our nation that are involved in this important work. I believe that we need to ensure that their efforts, which are dedicated to the conservation of marine mammals and their habitats, are recognized in the reauthorization of the Marine Mammal Protection Act for it to be truly effective.

Thank you again, Mr. Chairman, for calling this hearing and providing me with an opportunity to say a few words.

Mr. STUDDS. I thank our minority philosopher poet. The gentleman from New Jersey.

Mr. PALLONE. Thank you, Mr. Chairman. I noticed in the written statements of Mr. Reynolds, he mentioned that there is no mechanism to expedite permit issuance when necessary to protect or otherwise benefit a species population or individual marine mammal which is in jeopardy. And also I guess it was in Dr. Tyack's statement he talked about a situation in Cape Cod with whales where the NMFS was required to obtain permits to take the whales by harassment and NMFS took a year to issue the permit and if the scientists had not continued to rescue the whales illegally during this year, whales might have died.

I am not sure if this relates directly to my situation in New Jersey, it may very well. Because I am not sure that the permit was the issue, but we had a situation I guess a month or so ago where we were trying to basically rescue dolphins in the Shrewsbury River which is in my district, that had been caught in the ice. In other words, I think it was at the end of December, I forget exactly the date, and all of a sudden the waters froze very quickly and the dolphins basically were not able to get out of the river. And requests were made from the Marine Mammal Stranding Center (Bob Schoelkopf); I think the stranding center is actually in Mr. Saxton's district. Where they wanted permission essentially to use certain nets to rescue the dolphins and take them out of the river and NMFS would not allow that because apparently they had some sort of a policy that said that if there was some way possible for

the animals to leave, you know, that they were not going to interfere with their movements.

I don't want to get into the specific configuration of the area, but basically the dolphins were trying to—it seemed that the dolphins were trying to swim south and the only way to get out was to swim north and there was reason to believe that they were not able to get out.

The reason I mention it is because the Marine Mammal Stranding Center, well actually what happened is that the ice froze again and we don't really know what happened to the dolphins, whether they died or they managed to swim out or whatever. But it caused a lot of concern over I guess the bureaucracy of getting this permission from NMFS, which may have been a permit or not and may have related to what Mr. Reynolds said, I am not sure. But it certainly sounds like it to me.

What the locals are saying, what Mr. Schoelkopf and the Marine Mammal Stranding Center is saying is that they would really like the policy changed so that more input could come from local people, those who are on the scene at the time, because they felt very strongly that these animals were in danger and that it was proper, appropriate action to take them out and they felt that they were hindered by NMFS's policy.

What I would like to do with the permission of the Chairman is to—I know we have already sent some letters on this, but perhaps give you more details about it, but I guess I wanted to ask either Mr. Reynolds or Dr. Tyack or whoever to respond to this and whether this actually relates to the permit concerns that you raised in your testimony.

Dr. REYNOLDS. I will take a stab at it first. Before I make some general comments, I would note that I am not familiar with the specifics of the situation you described, but the problem is that there are instances where fast action is needed in order to preserve individual animals or populations or potentially species. Right now, there is no mechanism now to get around the 30-day comment period. And we would agree with you and recommend that procedures be changed to allow emergency responses to this sort of situation.

There have been other situations where lack of ability to respond quickly has been a problem, and I will give you one example. Back in the early eighties there was a die off of monk seals on Laysan Island. Hawaiian monk seals are an endangered species. At that time, there were no biomedical data, no clinical data available on monk seals, and so there was an attempt to get a permit quickly or to waive the permitting process in order to sacrifice an animal to get normal blood values so you could assess what is pathological. This would allow you to start to make a determination on why members of this endangered species were dying off. And it wasn't possible to do that.

And so, again, without knowing the specifics of your situation, I would say that it might fall into this category. I would be interested in learning more about it, but clearly there are times when the health of animals is in jeopardy and it would nice to be able to act very quickly.

Mr. PALLONE. Well, perhaps what I could do, with the permission of the Chairman, is send you some information on it and perhaps

we could sit down and talk about what could be done to change the regs or the policy, because it sounds almost exactly like what happened in Cape Cod to me and we really don't know whether or not the animals were saved or if they actually died because of the frost. Thank you.

Mr. REYNOLDS. We would be happy to sit down and talk with you.

Mr. STUDDS. Thank you. I want to thank all of the panel. I would like to reassure the members that the phrase "public display community" does not refer to this institution. It bothers me a lot when I hear that. It has been a fascinating morning. I apologize for the interruption and I appreciate your patience and in some cases your endurance, to say nothing of your mellowness, and we will stand—we look forward to working with you all. I am very hopeful we can work this out. The Subcommittee stands adjourned.

[Whereupon, at 12:32 p.m., the Subcommittee was adjourned, and the following was submitted for the record:]

STATEMENT OF
NANCY FOSTER
DEPUTY ASSISTANT ADMINISTRATOR FOR FISHERIES
NATIONAL MARINE FISHERIES SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
COMMITTEE ON MERCHANT MARINE AND FISHERIES
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 10, 1994

Mr. Chairman and Members of the Subcommittee: I am Dr. Nancy Foster, Deputy Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce. I appreciate the opportunity to testify before this Subcommittee.

Last year you held a hearing on interactions between marine mammals and commercial fishing under the Marine Mammal Protection Act (MMPA). Today our testimony addresses other aspects of the Act, including permits for purposes of public display, scientific research, and enhancement.

Over twenty years ago, Congress declared that marine mammals merited special protection and passed a landmark piece of legislation for this purpose, the MMPA. During the last twenty years, we have been careful to administer this important law consistent with its policies and objectives. The MMPA not only declares a strong public interest in the protection and humane treatment of all marine mammals, both those found in the wild and

in captivity, but it also declares a public interest in the conduct of certain activities that involve these marine mammals, such as scientific research and public display. As with many laws that protect our Nation's natural resources, the MMPA attempts to balance these sometimes conflicting public interests. Consistent with these mandates, we have worked hard to carry out this balancing act while, at the same time, keeping to a minimum the administrative burden on the businesses and individuals whose activities are regulated.

In 1988, Congress enacted amendments to the MMPA that affected public display and scientific research permits. At about the same time, the National Marine Fisheries Service (NMFS) recognized that, in response to persistent problems under the current regulatory regime and to address the many issues and questions of approximately 17 years of permit administration, an in-depth review of our permit program was necessary. This comprehensive and lengthy review of the permit program for scientific research and public display included extensive involvement by all interested parties. The review has resulted in a number of administrative improvements, many of which we have already begun to implement.

In addition, we proposed a rule to revise permit regulations on October 14, 1993. These revised permit regulations address comprehensively the many issues and problems that were examined

during the review. The comment period for these proposed regulations closed on January 28, 1994. We received well over 150 comment letters representing a wide range of views.

While a thorough analysis of these comments will take some time, several recurring themes are clear and reflect the many strongly held and widely divergent opinions of various groups and interests, some of which are represented at this hearing today. Many of these issues concerning marine mammal public display and scientific research have become increasingly controversial, particularly in the last ten years. This Committee and Congress addressed several of these issues in the 1988 amendments to the law; including requiring education or conservation programs, public access, and regularly scheduled hours for the public display of captive marine mammals. And, these same 1988 amendments also required that scientific research involving marine mammals must be bona fide, avoid unnecessary duplication, and involve lethal methods only where there is no alternative. Today, several public display and scientific research issues are again before this Committee in an even more intense and fundamental manner.

I believe it would be most helpful to this Committee if I address briefly a few of the issues that have arisen in the last several months in response to the proposed revised permit regulations and recent litigation. I expect these issues to be the focus of

today's testimony and this Committee's review of permit issues. These issues fall into two broad categories: first, whether the MMPA protects captive marine mammals, and second, what and how activities involving marine mammals in the wild should be regulated, particularly scientific research activities.

Captive Marine Mammals

Representatives of segments of the public display community believe there is duplication among Federal agencies where captive marine mammals are concerned. And, as a result, these groups are asking this Committee to consider amending the MMPA to address their concern. As I will explain in greater detail later in this testimony, we do not agree that such duplication exists among Federal agencies concerning captive marine mammals; and we believe that such an amendment is unnecessary. If such an amendment is nonetheless the decision of this Committee and Congress, unless carefully crafted, it would put at risk the special protection provided captive marine mammals under the MMPA and could itself create duplication of responsibilities or, at a minimum, require additional funding and resources for implementation.

In a related matter, The Mirage, a recent public display permit holding casino-resort in Las Vegas, filed a lawsuit in September 1992 in Federal District Court in Nevada. The Mirage wished to

begin conducting a swim-with-the-dolphins program similar to four existing experimental programs. NMFS denied this request by The Mirage, as we had several other such requests, explaining that, until a study was completed on the effects of such swim-with programs on the dolphins, no additional such programs would be authorized. The Mirage then filed a lawsuit to overturn this decision by NMFS. As one of several counts in its lawsuit, The Mirage challenged whether the MMPA applies to captive marine mammals at all.

On November 24, 1993, the District Court judge decided this case in favor of The Mirage, ruling that the MMPA does not apply to captive marine mammals. Although the decision interpreted the statute, the parties and the court agreed that this decision applies only to The Mirage pending the outcome of an appeal. Although the ruling allows The Mirage to conduct a swim-with program before completion of the study, The Mirage has agreed in the interim to abide by most of the conditions contained in the permits of the four experimental swim-with-the-dolphins programs that are a part of the study. The Department of Commerce has asked the Justice Department to appeal this District Court ruling.

Now, following this lawsuit by The Mirage, and more than twenty years after enactment of the MMPA, the issue is being raised as

to whether or not the MMPA applies to those marine mammals held in public display facilities.

We believe the current law most certainly does apply. NMFS through the MMPA, and the Animal and Plant Health Inspection Service (APHIS) through the Animal Welfare Act, both assert jurisdiction over captive marine mammals, but with different emphasis and under different conditions. The protection for marine mammals under these laws is complementary, not duplicative. It is important that the responsible Federal agencies work closely together to avoid duplication and ensure that actions are coordinated and limited agency resources are used in the most effective and efficient manner practicable, while providing the best possible protection for marine mammals. We believe, as does APHIS, that our interagency agreement is working well and provides an appropriate mechanism for resolving any issues that arise concerning our respective roles in protecting marine mammals.

A few facts and some background will help to illustrate how Federal efforts are currently being coordinated. Under the existing MMPA, all marine mammals, both wild and captive, have been declared by Congress as worthy of special protection. It is within this context that NMFS and the U.S. Fish and Wildlife Service administer the permit provisions of this law. APHIS

administers the Animal Welfare Act as it applies to many kinds of animals, including marine mammals.

We work closely with APHIS. When we review an application for a public display permit, in addition to considering the public display-specific requirements of the MMPA, we ask APHIS to review and comment on the application, considering the results of their most recent routine inspection of the applicant's facility, or, if the facility is new, to conduct an inspection. In this manner, we rely on APHIS assurances that applicable care and maintenance standards for marine mammals are met by the applicant before issuing a permit. Then, as a condition of the public display permit, NMFS requires the permitted facility to adhere to these care and maintenance standards.

Other terms and conditions of the permit incorporate public display-specific requirements of the MMPA, provide a mechanism for tracking the marine mammals held by the facility, and meet other requirements of the law applicable to captive marine mammals. We routinely work with APHIS in investigating complaints regarding the humane care and treatment of captive marine mammals. We recently reviewed our working relationship with APHIS and both agencies concluded that we are working together well and our long-standing interagency agreement for this purpose remains effective.

As background, after enactment of the MMPA in 1972 and until 1979, NMFS included detailed terms and conditions for the care and maintenance of captive marine mammals in all public display permits. During this seven year period, captive care standards for marine mammals were applied and enforced solely by NMFS and the Fish and Wildlife Service under the authority of the MMPA; there were no such standards in existence under the Animal Welfare Act.

In 1979, several steps were taken to avoid duplication. APHIS, recognizing the unique captive care and maintenance needs of marine mammals, and after consultation with the Marine Mammal Commission, NMFS, and the Fish and Wildlife Service, promulgated for the first time marine mammal standards under the Animal Welfare Act. Additionally, NMFS and the Fish and Wildlife Service signed an interagency agreement with APHIS to avoid duplication and share available resources. Finally, to avoid such duplication, NMFS then amended all public display permits to reference these care and maintenance standards issued by APHIS.

The 1993 revisions in our October permit regulations continue to apply these fifteen-year-old care and maintenance standards to permits issued under the MMPA.

With its field inspection staff, APHIS was and continues to be in the best position to conduct routine inspections of facilities.

We believe that this cooperative interagency approach will not require additional resources by either NMFS or APHIS to carry out our respective responsibilities concerning captive marine mammals.

During our permit program review, many serious questions were raised regarding the adequacy of these now fifteen-year-old marine mammal care standards. To address these concerns, APHIS has agreed to initiate a review of the standards in cooperation with NMFS, the Marine Mammal Commission, and the Fish and Wildlife Service. These are the agencies with the most knowledge of marine mammal behavior, physiology and population dynamics. It remains our position that in the unlikely event the revised APHIS standards under the Animal Welfare Act do not reflect the special status and protection afforded marine mammals under the MMPA, only then might it become necessary to supplement, but not duplicate, such existing standards.

We believe that both the spirit and letter of the existing MMPA confer jurisdiction over captive marine mammals. However, we agree that, since a question has arisen as to whether the MMPA applies to captive marine mammals, this issue is too important to leave any doubt as to the intent of Congress. We agree that the question should be dealt with directly and that the intent of the law should be clear.

This Committee and Congress may reaffirm that the MMPA does protect captive marine mammals; either retaining that authority with the Secretary of Commerce and NMFS or assigning entirely the jurisdiction and responsibility for captive marine mammals under the MMPA to a different Federal agency, such as the Secretary of Agriculture and APHIS. Or, this Committee and Congress may decide that the MMPA applies only to marine mammals in the wild and not to captive marine mammals. Importantly, we request in the strongest terms that any considered amendments be drafted in the clearest possible manner. At a time when public controversy and criticism concerning captive marine mammals continues to increase, it is critical that the regulated communities and the public understand which laws apply and what agency or agencies of the Federal government are responsible for oversight of captive marine mammals, in what capacity and to what degree.

It is our position that, if this Committee and Congress reaffirm that captive marine mammals are protected by the MMPA, the Secretaries of Commerce and the Interior, in consultation with the Marine Mammal Commission, have the most relevant expertise regarding the issuance of permits for activities involving such marine mammals. These same agencies can best ensure that this law is implemented consistent with the intent of Congress.

If, however, this Committee and Congress decide to amend the MMPA to assign jurisdiction and responsibility for captive marine

mammals to the Secretary of Agriculture and APHIS, then it is particularly important that this amendment assign all responsibility for captive marine mammals to APHIS in the clearest possible terms. In the event Congress decides to take this approach, the Department of Agriculture should be consulted as to their willingness and capability to assume these responsibilities.

First, the law needs to clearly state whether captive marine mammals are afforded the special protection of the MMPA, or if, while held captive, they are subject only to the jurisdiction of the Animal Welfare Act. If the former is true, then responsibility must be clearly assigned for oversight of all MMPA-mandated activities involving these animals, including public display requirements for acceptable education and conservation programs and public access, and requirements for scientific research and enhancement specific to captive marine mammals. Other responsibilities that would need to be explicitly assigned under such circumstances include the tracking and monitoring of captive marine mammals, including the development and maintenance of a comprehensive marine mammal inventory database; the development and implementation of standards for "interactive" programs, including swim-with-the-dolphins programs and captive feeding programs; and addressing the many marine mammal-specific captive maintenance concerns addressed in our proposed revised permit regulations.

Before I leave captive display questions and move on to the important issues affecting marine mammals in the wild, I would like to give just one example of the variety of complex problems that must be dealt with in deciding this jurisdictional issue. The problem to be examined is responsibility for the care and maintenance of abandoned maine mammals held in captivity for public display. The following brief, but illustrative, example is an incident that occurred just over a year ago in which 13 harbor seals and California sea lions held at the Cape Cod Aquarium were essentially abandoned. A few months before the incident, the Cape Cod Aquarium was issued a public display permit after several months of addressing significant concerns raised by NMFS. Many of these concerns arose from a succession of complaints and allegations by the public of substandard care and other problems at the Cape Cod Aquarium. Prior to the abandonment of these captive marine mammals, the Cape Cod Aquarium was repeatedly found by APHIS to be in compliance with applicable care and maintenance standards under the Animal Welfare Act. Following the abandonment of these marine mammals and closing of this public display facility to the public, APHIS explained that they no longer had jurisdiction over these marine mammals under the Animal Welfare Act because the animals had been removed from public exhibit; leaving only MMPA protection under our jurisdiction. Consistent with a pre-existing verbal agreement between the Cape Cod Aquarium and the New England Aquarium to care for these animals in an emergency, under the

MMPA we authorized the New England Aquarium to assume custody and responsibility for the care and maintenance of these abandoned marine mammals. Although this willingness on the part of the New England Aquarium to assume custody of these marine mammals addressed the immediate problem of their care and maintenance, the much more difficult problem was their placement at other acceptable facilities and the cost in both space and time of their care until such placement could be arranged.

Although these sea lions and harbor seals were eventually placed at other facilities, it took several months of dedicated effort by our Regional staff, the staff of the New England Aquarium, and our permits office to find facilities willing to accept them -- during the last stages of this effort the American Association of Zoos and Aquariums and the Alliance of Marine Mammal Parks and Aquariums also assisted in this several month effort to identify facilities that would be willing to accept custody of these animals. The New England Aquarium incurred over $100,000 in personnel and captive maintenance costs in the care and transport of these abandoned animals. We are aware of the extent of these costs because, even though there have never been Federal appropriations to cover such costs, we received invoices from the New England Aquarium itemizing their expenses.

This is only one of several instances that point out one of the more significant growing problems of the public display industry

-- the need to care for and place abandoned or otherwise unwanted marine mammals, especially pinnipeds. Although this problem is likely to occur only in the most marginal of facilities, it is nonetheless a potential problem for all public display facilities; as the Cape Cod incident clearly illustrates. In our proposed revised permit regulations we propose a method for beginning to address this problem. These proposed regulations provide for, and we would much prefer, industry self-regulation and pre-placement planning on this issue. However, only 60 percent of public display facilities are members of either the American Association of Zoos and Aquariums or the Alliance of Marine Mammal Parks and Aquariums. And, even if these groups agree to placement of marine mammals among their member institutions, there will always be a number of public display facilities that will not be included in any association-sponsored placement plan for abandoned marine mammals. It is for these facilities that the proposed permit regulations propose a surety bond that, upon abandonment or seizure of captive marine mammals, may be invoked by NMFS to defray at least some of the expenses of the permit holder that assumes temporary or long-term custody of such marine mammals.

NMFS believes that this and similar difficult problems increasingly jeopardize the health and welfare of captive marine mammals, and must be addressed directly. Again, to the extent possible, these problems should be addressed by the public

display industry itself. However, where, for one reason or another, the health and welfare of captive marine mammals falls through the cracks, these marine mammals must be protected by the regulating agency under the MMPA, whether it is NMFS or APHIS.

Marine Mammals in the Wild

As for activities involving marine mammals in the wild, we believe that some changes in the law are necessary.

The scientific study of marine mammals is an important source of information on these protected species. And, I can tell you from repeated first-hand experience, that many marine mammal scientists believe there is something wrong with a law that requires them to go through an application, public notice, and review process to get a permit, while this same law allows commercial fisherman to incidentally take marine mammals under a simple registration procedure. This perception that marine mammal research is being regulated unfairly is reinforced when the question is raised, "Which of these activities, commercial fishing or marine mammal research, is more likely to benefit marine mammals?"

At present, scientific research that involves only non-intrusive close approach must meet the same permit requirements as apply to more intrusive research. Applying these same permit requirements

to all research activities conducted in the wild, including those involving non-intrusive close approach, has proven inefficient and inflexible. Clearly, the permit requirements of the MMPA are too burdensome and too lengthy when the research involves only the non-intrusive close approach of marine mammals in the wild.

Much of the scientific research on wild marine mammals involves only non-intrusive close approach without significant contact or restraint. We believe that the MMPA should be amended to shorten and simplify the permit process for scientific research involving these low-impact types of harassment.

In addition, there are other activities that have proven important in increasing the public's understanding and appreciation of marine mammals. These include both activities that allow the public to observe these magnificent animals in the wild and efforts to bring documentary films and photographs of wild marine mammals to the large segment of the public that will never be able to observe them in their natural habitat. The law, as presently written, does not provide an exception to the general moratorium on the taking of marine mammals for purposes of public observation or wildlife photography, resulting in a virtual prohibition on the non-intrusive close approach of wild marine mammals for such educational purposes. Such non-intrusive close approach of wild marine mammals should be authorized under the law and monitored appropriately by NMFS. However, it is

clear that the such authorization and monitoring should be simple and straightforward, and that such activities should not be subject to the same review as more intrusive procedures.

We propose that the MMPA be amended to provide for the permitting of non-intrusive close approach of marine mammals in the wild for purposes of public observation and wildlife photography. We also propose that the law be amended to allow the Secretary to waive the 30-day public comment period for both scientific research permits and the new permits for public observation and photography, where such permits involve only the non-intrusive close approach of marine mammals. We would be pleased to discuss other amendments that would achieve these same objectives.

There are a few other issues that cannot be addressed solely through the regulatory process or improved administration of the permit program. These issues, if they are to be addressed, require amendments to the MMPA. These include:

1) The exchange of native art between U.S. and foreign museums or other institutions open to the public, where such native art, in whole or part, includes marine mammal parts subject to MMPA prohibitions. The MMPA does not include a specific provision for exempting art works and handicrafts containing marine mammal parts from the prohibition on importing such parts. If such native art is not purchased or sold, NMFS believes that the MMPA

should be amended to provide for the import and export of such native art for the purpose of its exhibit in a museum or other similar institution open to the public, or for other native cultural purposes.

2) Similarly, the MMPA does not provide an efficient mechanism to authorize small levels of harassment incidental to other activities. The regulatory process of section 101(a)(5) of the MMPA is a lengthy procedure that precludes authorizing some activities with only minor impacts. The Act should be revised to allow small, incidental takes of marine mammals that have only a negligible impact under a much more straightforward, simpler, and less lengthy process.

3) The exemption from the MMPA for animals already in captivity prior to the enactment of the MMPA should be rescinded. Although this exemption may be appropriate in the case of marine mammal parts or products, NMFS believes it is time, more than 20 years after enactment of the MMPA, to remove this exemption as it applies to living animals held captive for public display or scientific research purposes. This exemption served its purpose during the initial period following enactment of the MMPA. Marine mammals presently exempted from the provisions of the MMPA should be afforded the same protection under the MMPA as all other marine mammals. It is time to ensure that the provisions

of the MMPA apply consistently to all marine mammals held for public display or scientific research purposes.

Thank you Mr. Chairman and Members of the Subcommittee for this opportunity to express the views of the Department. I would be pleased to answer any questions you or other Members may have.

Responses from Dr. Nancy Foster to
Questions by H. James Saxton Before the
Subcommittee on Environment & Natural Resources
February 10, 1994

Your questions were in reference to the Proposed Rule to Revise Regulations for Public Display and Scientific Research Permits under the Marine Mammal Protection Act (MMPA), Endangered Species Act (ESA), and the Fur Seal Act (FSA), published in the Federal Register on October 14, 1993.

1) **Why are these Regulations Necessary?**

The proposed rule is necessary to address concerns identified by the regulated communities, conservation organizations, and federal agencies regarding inconsistencies and uncertainties in the permitting process; the lack of enforcement against non-compliance and abuse of permit privileges; and the vulnerability to frequent litigation.

Briefly, following the extensive amendments Congress made to the MMPA in 1988, NMFS initiated an open review of the permitting process. The proposed rule is the product of that review. The rule proposes to implement the 1988 amendments, consolidate existing regulations under one section of the U.S. Code, establish consistent and predictable regulatory requirements, eliminate duplicative procedures, clearly define permitted activities to avoid unnecessary litigation, and establish clear and enforceable responsibilities for permit-holders to address problems with non-compliance and abuse.

2) **Why are they not overreaching?**

I believe you were referring to two primary areas of criticism by the public display industry: (1) the proposal for a surety bond and (2) the requirement for education and conservation programs.

First, the proposal for a $10,000 surety bond to be provided for each marine mammal in captivity is to cover the expense of care, transport and final disposition in the event of abandonment. The amount and the mechanism of a surety bond was included in the proposed rule to initiate broad discussion of this serious problem. This would be a one-time cost, per animal, per facility, with per-facility costs never exceeding the actual number of animals held by that facility. The industry estimates the maximum cost to be $500 per animal.

Beyond the humane issues involved with the disposition of abandoned animals, there is the economic issue of public monies

being used to bail out for-profit businesses. For years, NMFS has encouraged the display industry to self-insure against this problem. The larger, more prominent display facilities, under membership of the AZA (American Association of Zoos and Aquariums) and The Alliance of Marine Parks and Aquariums, indicated during testimony that they are willing to initiate discussions on this subject. Although we applaud efforts to address this issue, it is important to note that 40% of the industry does not hold membership with these organizations. These are often small, marginal facilities, with histories of non-compliance and economic uncertainty. As such, it is important that the animals held at these facilities be provided for.

Second, the other area being criticized as "far-reaching" by the public display industry is the 1988 Congressionally mandated requirement for educational and conservation programs to be provided at public display facilities. These are to meet "professionally recognized standards", and be "acceptable to the Secretary of Commerce". Unfortunately, "professionally recognized standards" have not yet been developed by the public display community.

Critics mistakenly assert that NMFS is proposing to regulate the content of these programs. Based on the diversity of display facilities, NMFS recognizes that the content of education and conservation programs, and the methods employed to communicate to the public, will necessarily vary. Therefore NMFS has no intention of attempting to dictate or regulate the content and style of such programs. While leaving decisions of form and substance to the professional educators, as they should be, the proposed rule includes as a basic "acceptable" requirement that, whatever the content or technique, such educational programs must effectively convey information that is accurate and consistent with the policies and objectives of the MMPA.

A Facility that conducts a professional education or conservation program should have no problem meeting such a basic requirement.

3) **How are we going to pay for them?**

The NMFS has requested no increase in funding from current levels. Rather, with the increased efficiency expected to accrue from the proposed rule, NMFS anticipates being fully able to conduct the program envisioned by the proposed rule.

STATEMENT OF MOLLIE BEATTIE, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES, CONCERNING REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT

February 10, 1994

Mr. Chairman, I appreciate the opportunity to discuss the Marine Mammal Protection Act. In addition to an overview of the activities of the U.S. Fish and Wildlife Service, my statement provides information on the status of marine mammals under our jurisdiction and proposals we are considering for amending the Act.

FISH AND WILDLIFE SERVICE INVOLVEMENT

The Act establishes a Federal responsibility for the conservation of marine mammals. Under the Act, the Secretary of the Interior, through the Service, is responsible for protecting and managing polar bears, sea and marine otters, walruses, manatees, and dugong.

In general, the Act establishes a moratorium on the taking and importation of marine mammals, but contains procedures for waiving the moratorium under certain circumstances. The taking of marine mammals by Alaska Natives for subsistence or for creating and selling authentic Native handicrafts and clothing is exempted from the moratorium, as long as it is accomplished in a non-wasteful manner.

The Act establishes a procedure for transferring to the States the authority to manage marine mammals. The Act also authorizes the

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Secretaries of the Interior and Commerce to allow incidental, but not intentional, take of small numbers of marine mammals during commercial fishing operations -- an issue that has received considerable attention since the Act was last amended in 1988 -- and in association with other, specified activities.

Within the Department of the Interior, the Service is responsible for managing marine mammals under our jurisdiction, and for enforcing the moratorium on taking and importing marine mammals and marine mammal products. In carrying out these responsibilities, we evaluate and process requests for waivers of the moratorium, as well as requests for transfer of management authority to the States, and we conduct law enforcement activities.

The Service also advises the Department's Outer Continental Shelf Development Program and reviews measures proposed to protect marine mammals during offshore oil and gas exploration and development. Finally, we participate in the development of international agreements and activities.

Under authority of the Endangered Species Act, the Service lists marine mammals under its jurisdiction that are endangered or threatened, and we enter into consultations with Federal agencies to protect such species.

In conducting these activities, the Service maintains a cooperative

working relationship with the Marine Mammal Commission and its Committee of Scientific Advisors, the National Marine Fisheries Service, the newly created National Biological Survey, the Bureau of Indian Affairs, and other Federal agencies. We also cooperate with affected States, Alaska Native organizations, conservation organizations, and other entities on marine mammal issues of mutual concern.

STATUS OF MARINE MAMMALS UNDER SERVICE JURISDICTION

All three species of manatees, the dugong, the marine otter, and the southern or California sea otter are listed as endangered or threatened under the Endangered Species Act and, therefore, are considered depleted under the Marine Mammal Protection Act. Marine mammal species under Service jurisdiction in Alaska are considered to be non-depleted and populations are currently believed to be healthy.

The Pacific walrus, a population shared with Russia, had an estimated minimum population of 201,000 in 1990 based on a joint Russia/U.S. population survey. Although this estimate is less than the estimate of 232,000 animals derived from the 1985 survey, anomalous ice conditions prevailed during the 1990 survey and comparing the two estimates is, at best, a tenuous proposition. The Service believes the Pacific walrus population is at or near historic high levels and is stable or slightly decreasing.

The polar bear population in Alaska is shared with both Canada and Russia and is believed to number about 5,000 animals. The northern, or Beaufort Sea, population is estimated to be 1,800 animals. The western, or Bering-Chukchi Sea, population is believed to number about 3,200 animals. The Service considers polar bear stocks in Alaska to be healthy and possibly increasing slightly.

A growing population of sea otters in Alaska, estimated to number between 100,000 and 150,000 individuals, has become reestablished in most of the species' historic range and is considered by the Service to be healthy. Although the population as a whole is healthy, specific subpopulations within the State are of concern. The south-central Alaska sea otter population is in a recovery phase from acute mortality following the *Exxon Valdez* oil spill of 1989, and long-term sublethal effects on the population are not well understood. In southeast Alaska, harvest numbers have increased dramatically and there is concern that the population level may be affected.

Although the Service believes that population levels of these three Alaska marine mammals are sound, we are considering proposals addressing issues necessary to ensure their long-term viability. These proposals include the following, that will be discussed in the order they appear in the Act.

Whether the Act's language is precise enough to allow specific protection of marine mammal habitats has been questioned. There is also confusion as to whether the Act authorizes actions solely for species below optimum sustainable population levels, or for all marine mammal species irrespective of the status of their populations. Further, there is an apparent inconsistency in the use of the terms "major objective" and "primary objective."

In section 2(7) of the Act, Congress found that marine mammal management should "maintain the health and stability of the marine ecosystem." While single-species oriented initiatives have achieved some important success under the Act, greater emphasis must be placed on understanding and managing the complex factors that govern the health and stability of the marine environment.

By adopting an anticipatory, ecosystem-based approach to managing marine mammals and their habitat, it should be possible to protect living marine resources, avoid legal restrictions that could hinder resource use and development activities that impact protected species, and advance the Act's primary goal of marine ecosystem health and stability.

To ensure the authority to develop regulations to protect specific threatened or vulnerable habitats, we are considering recommending amendments to sections 2 and 3 to include and broaden habitat protection provisions. The habitat protection provision of the

1973 International Agreement on the Conservation of Polar Bears, a provision that has not been fully implemented, may also need to be specifically addressed.

The Service is concerned with the clarity of definitions in section 3. For example, the Act is ambiguous about what constitutes an authentic Native handicraft, and the lack of specificity hinders management activities, such as providing sound legal advice to Native hunters.

The term "edible portion" is not currently defined, and that has led to the sale of gall bladders and male reproductive organs as aphrodisiacs or for other purposes. The increased sale and interstate transportation of these items could affect the harvests of certain species, such as polar bear. We are looking at ways to exclude these items from the definition of edible portion in section 101(b)(2) of the Act.

To clarify the standards that apply, the Service is examining modifications to section 101 of the Act to specifically authorize the Secretary to address import and taking moratorium waivers on a population and species-specific basis, thus assuring foreign governments that the Secretary would evaluate their management programs on the same basis as waivers of the moratorium for domestic management programs. This would slightly ease current conditions that prevent legally sport-hunted marine mammals from

being imported into the United States, a restriction that is often insufficiently supported by biological rationale.

The Service is considering the need for amendments to section 101(b) to address methods and means of harvesting marine mammals, and to ensure consistency with the 1973 International Polar Bear Agreement. Currently, the Act does not contain any restrictions on methods and means for Alaska Native hunters, and therefore may be inconsistent with the 1973 agreement. Thus, we are considering proposing a prohibition on the use of aircraft and large motorized vessels in the taking of polar bear by Alaskan Natives, including the use of any aircraft to locate, land, and shoot polar bear, or in transporting polar bear or polar bear parts taken in violation of the Act.

We are also reviewing ways to enhance the management provisions of section 101(b) by authorizing the Secretary to initiate the development of harvest restrictions when the population of a species declines to ten percent above the depletion level. The actual implementation of those restrictions would not occur until the species is at the level of depletion. We are considering a process that would maintain the integrity of the Native subsistence exemption while ensuring that a critical regulatory program would be in place at the point of depletion and not years later.

Initiation of the regulatory process prior to depletion would also

draw public attention to the serious decline of the species, hopefully generating voluntary harvest restrictions that could avoid depletion altogether. Under the approach we are considering, the establishment of prescribed regulations that would be made after public notice and a formal hearing on the record. This proactive approach would ensure that marine mammals continue to provide subsistence benefits to future generations of Alaskan Natives without imposing unnecessary restrictions on these benefits.

The proposed benchmark of a population size ten percent above the depletion level would serve only as a mechanism to trigger the formal rulemaking process for promulgating regulations. If the depletion level were reached, no take, other than Native subsistence take, would be authorized and Native subsistence take would be subject to restrictions imposed by the Secretary's regulations. These regulations would be reviewed and revised, as necessary, no less than every six years.

We are also considering proposing amendments to relax restrictions on exchanges of personal items between Alaska Natives and indigenous peoples of other circumpolar nations where marine mammals occur, and allowing Alaska Natives to bring personal items back into the United States when returning from foreign travel.

Alaska Natives engage in cultural and other exchanges with other

Natives, including those from Russia, Canada, and Greenland. Increased openness with Russia has facilitated reestablishment of family ties between Russian and Alaska Natives, but provisions in the Act that prohibit importation have precluded the opportunity for Alaska Natives to receive gift items from Native peoples from Russia, Canada, Greenland, and Norway. Further, the Act prohibits Alaska Natives from taking marine mammal products out of the United States and then returning with those same items. This problem also needs to be addressed.

Currently, the Act does not provide for lethal take of polar bears in defense of life, an omission that could be viewed as a technical oversight. Lethal takes do occur infrequently. They are currently investigated on a case-by-case basis and are handled as a matter of prosecutorial discretion. We are looking at ways to specifically allow any person to intentionally take a polar bear by harassment for deterrence purpose and, as a last resort lethally, in defense of life. The provision would be specific to defense of life and not to defense of property.

Presently, we are examining our authority to issue permits for long-term maintenance of rehabilitated but non-releasable marine mammals. To address this issue, we are looking at ways to clarify the current permit requirements of section 104 to make clear that holding facilities must obtain a permit for long-term captive maintenance of rehabilitated marine mammals that are deemed to be

unfit for return to the wild.

We are also exploring ways to provide grants to develop and implement management agreements with Alaska Natives. The Service is developing new conservation plans for polar bears, sea otters, and walrus. Alaska Natives have played, and will continue to play, an integral role in developing and implementing these plans, and there is increasing impetus for developing and implementing management measures with Alaska Natives.

The Service is party to memoranda of agreement with the Alaska Sea Otter Commission and the Eskimo Walrus Commission. Through a grants program, Alaska Native organizations could hire professional biologists and subsistence use specialists that would facilitate their interactions with Federal and State managers and biologists, as well as the development and implementation of management programs. Such professionals could also facilitate development of conservation education programs and assist in collecting and disseminating traditional and cultural knowledge to government scientists.

The success of the North Slope Borough in self-regulating marine mammal management programs, as demonstrated in their polar bear agreement with the Inuvialuit Game Commission in Canada, can largely be attributed to their funding support and maintaining a professional staff of wildlife biologists, veterinarians, and

subsistence use specialists.

Lastly, we are looking at the possibility of establishing a new "Information and Education" program to develop materials to further public knowledge and understanding of marine mammals and their habitats. Public interest in marine mammals is at an all-time high, and there is a need to provide the public with sound biological information. This effort would help to heighten awareness of this important need.

Thank you again, Mr. Chairman, for the opportunity to testify these important issues. I will be pleased to respond to questions.

STATEMENT OF
JOHN E. REYNOLDS, III, PH.D.
CHAIRMAN
MARINE MAMMAL COMMISSION

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
COMMITTEE ON MERCHANT MARINE AND FISHERIES

HOUSE OF REPRESENTATIVES

FEBRUARY 10, 1994

Mr. Chairman and members of the Committee:
I am John E. Reynolds, III, Chairman of the Marine Mammal Commission. It is my pleasure to appear before you this morning. As requested, I will confine my remarks to issues related to reauthorization of the Marine Mammal Protection Act other than the new regime to govern the take of marine mammals incidental to commercial fisheries.

The Committee specifically requested the Commission's views with respect to scientific research permits under the Marine Mammal Protection Act and on the management of marine mammals for public display. I would also like to comment on issues of concern to Alaska Natives and the need to reconcile the provisions of the Marine Mammal Protection Act with our international responsibilities under the Agreement on the Conservation of Polar Bears. I shall address issues related to scientific research first.

Scientific Research

When it passed the Marine Mammal Protection Act in 1972, Congress recognized that there was inadequate knowledge of the ecology and population dynamics of marine mammals and realized that a vigorous research effort would be needed to overcome this deficiency. After all, it is difficult or impossible to make wise decisions with incomplete or inaccurate data. The Act directed the Secretaries of the Interior and Commerce to undertake a marine mammal research program and authorized the Secretaries to issue permits allowing the taking and importation of marine mammals, including those from depleted populations, for purposes of scientific research.

The Act requires that permits authorizing the taking or importing of marine mammals for scientific research or other purposes specify --

(A) the number and kind [e.g. the species, age, and sex] of animals which are authorized to be taken or imported,

(B) the location and manner (which manner must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported,

(C) the period during which the permit is valid, and

(D) any other terms or conditions which the Secretary deems appropriate.

Such permits also are to specify "the methods of capture, supervision, care, and transportation which must be observed pursuant to and after such taking or importation."

Each permit application must be reviewed by the Marine Mammal Commission in consultation with its Committee of Scientific Advisors. Also, the Act requires that notice of each permit application be published in the Federal Register and the public be given 30 days to review and comment on the application. There currently is no provision in the Act for waiving the 30-day comment period, even when a waiver would be in the best interest of the marine mammals involved or when unanticipated and possibly unique research opportunities would be lost.

The Act was amended in 1988 to set forth additional requirements applicable to scientific research permits. The amendments specify that:

> A permit may be issued for scientific research purposes only to an applicant which submits with its permit application information indicating that the taking is required to further a bona fide scientific purpose and does not involve unnecessary duplication of research. No permit issued for purposes of scientific research shall authorize the killing of a marine mammal unless the applicant demonstrates that a non-lethal method for carrying out the research is not feasible. The Secretary shall not issue a permit for research which involves the lethal taking of a marine mammal from a species or stock designated as depleted, unless the Secretary determines that the results of such research will directly benefit that species or stock, or that such research fulfills a critically important research need.

The legislative history of this provision explains that the addition of the requirement that research further a bona fide scientific purpose was "not intended to substantively change the criteria for granting scientific permits" but was merely intended to codify existing regulations. Nevertheless, including this requirement in the statute focused attention on the determination that proposed research be bona fide. While the required finding may not have changed, the heightened scrutiny given scientific research applications by reviewing agencies as a result of the 1988 amendment has no doubt increased the paperwork burden placed

on both the applicants and the agencies.

Since enactment of the 1988 amendments, many scientists, including members of the Commission and its Committee of Scientific Advisors, have complained that it takes longer than it should and more information than necessary is required to obtain permits for scientific research. In response to these concerns, the Commission convened two workshops in 1993 to discuss the perceived problems and to identify possible solutions. Related factors noted by workshop participants included the following: (1) instructions to applicants are overly long, unclear, and not linked to the statutory and regulatory findings that must be made; (2) implementation of the requirement that research be "bona fide" has been more rigorous than was originally intended by Congress; (3) even for experienced scientists, it is not always possible to reasonably estimate in advance how and how many animals may be taken, particularly by harassment, in the course of certain types of research; (4) there is no mechanism to expedite permit issuance when necessary to (a) protect or otherwise benefit a species, population, or individual marine mammal which is in jeopardy, or (b) enable researchers to respond to the presence of uncommon animals or other unanticipated research opportunities that would otherwise be lost; (5) some permits contain unreasonably restrictive conditions and demanding reporting requirements; (6) all research permit applications are processed, and the research itself regulated, the same regardless of the degree and type of take or the status of the marine mammals involved; and (7) there is no way to authorize possible harassment of endangered, threatened, or depleted marine mammals in the course of making documentary films or taking photographs for either educational or commercial purposes.

Workshop participants identified several actions that could be taken to address these problems. They suggested specific changes to the permit application instructions currently used by the National Marine Fisheries Service that would make them more understandable to researchers, thereby reducing the possibility that incomplete or otherwise deficient applications would be submitted. In this regard, it might be helpful if Congress were to take steps to encourage the National Marine Fisheries Service and the Fish and Wildlife Service, in consultation with the Marine Mammal Commission and its Committee of Scientific Advisors on Marine Mammals, to develop and make available to the scientific community clear and concise instructions for preparing and submitting applications for permits to take marine mammals for purposes of scientific research. Further, it would be useful if Congress were to direct the Services to institute procedures whereby they would advise applicants, within 30 days of receiving an application, as to whether the application contains sufficient information to make the required determinations and, if not, precisely what additional information is required.

While processing times for permits have improved over the past year, the Commission believes that further improvement is possible and would be beneficial. For the 30 permits issued by the National Marine Fisheries Service and the 3 permits issued by the Fish and Wildlife Service in 1993, it took, on average, over three months to complete agency review once the application had been determined to be complete. The Commission believes that, even with a mandatory 30-day public comment period, the Services should be able to complete most reviews within 60 days. In this regard, it might be useful if the committee were to instruct the Services to make a concerted effort to meet this goal. If, by the end of 1995, the average time between receipt of a complete application and issuance of a permit for scientific research exceeds 60 days, the Services should be asked to (1) report as to why they have been unable to meet this objective and (2) suggest changes that would facilitate processing.

Another possible way to speed up review of applications for scientific research permits would be to authorize the Secretaries of Commerce and the Interior to exempt certain carefully selected categories of research, through regulation, from the notice and comment requirement and perhaps other existing permit requirements (e.g., the requirement that all permits specify the number of animals authorized to be taken). It would seem, for instance, that expedited review and issuance of permits would be appropriate in cases where, based upon past experience, it is clear that the research would have negligible effects on both individual and population health and welfare.

In this context, it is important to keep in mind that the likelihood and significance of possible effects may vary depending upon the species being studied, the type of aircraft, surface vessel, or other equipment being used, and the experience and expertise of the researcher, as well as the nature of the activity itself. For example, while there is no doubt that certain researchers have learned through experience how to approach certain species of whales in certain areas without disturbing them, it does not necessarily follow that inexperienced researchers can carry out the activity with a similar low likelihood of disturbance or that the same type of approach necessarily would have the same low probability of disturbing other species or the same species in different settings. Similarly, it does not follow that disturbing, handling, or tagging 100 individuals necessarily would have the same effect on every species or population -- e.g., endangered Hawaiian monk seals, threatened Steller sea lions, and much more numerous northern elephant seals and California sea lions.

Also, the process for authorizing the importation of specimen material for scientific research might be simplified by authorizing the Secretaries of Commerce and the Interior to exempt, through regulation, such importation from the Marine

Mammal Protection Act's notice and comment requirement when certain conditions are met. These conditions could include prior notification of intent to import specimens, a statement of scientific purpose, appropriate certification that the materials were collected and will be exported in accordance with the laws of the country of origin and any other applicable authority, and notification of what specimen material was actually imported.

As noted above, there has been some confusion regarding implementation of the requirement enacted in 1988 that only research for bona fide scientific purposes be authorized. While the National Marine Fisheries Service is trying to alleviate this problem through adoption of a regulatory definition of the term, it might be useful if Congress, in report language, were to provide additional guidance. In this regard, the Committee might indicate its intention that the term bona fide, as used in section 104(c)(3) of the Act, be given its common definition, i.e. that it refers to an application made in good faith without fraud or deceit, an application made with earnest intent, and a scientific purpose which is nether specious nor counterfeit.

Activities other than research that have been conducted under the authority of scientific research permits in the past include documentary film making and commercial photography. While it is clear that some filming and photography of marine mammals can be done in ways not likely to harass the animals, approaches that do cause harassment may, in other instances be necessary. The Commission believes that these activities can serve extremely useful educational functions. Unfortunately, the Act, as it exists, provides no straightforward way to authorize such taking, except through formal rulemaking, and then only for non-depleted species and populations.

If only non-depleted marine mammals were involved, film makers and photographers could seek a waiver of the moratorium. But, this process is unnecessarily complex and expensive in light of the type and level of taking that would be involved. It also should be noted that, as with public display permits, waivers may not authorize the taking of depleted marine mammals.

Also, filming and photography, while they can serve to raise public awareness of and appreciation for marine mammals, do not fit under the permit authority for enhancement added to the Act in 1988. Because there is no available alternative, scientific research permits have been used to authorize takings which occur while photographing or filming marine mammals.

The National Marine Fisheries Service has noted that there have been some problems associated with allowing commercial filming and photography under scientific research permits. At times, the desire to obtain valuable footage or pictures may create an incentive to approach animals in ways not necessarily

consistent with the authorized research. The Service believes that in some cases scientific research permits may have been used "as a subterfuge for conducting unauthorized commercial activities," and in its proposed regulations, would place strict limitations on when "marketable products" resulting from permitted scientific research could be sold.

The Commission concurs that only bona fide research, independent of any commercial or recreational considerations, should be conducted under scientific research permits. Under the proposed rule some photographs and films obtained by researchers could still be sold or otherwise disseminated, but only in limited instances. In some instances these limitations make sense; in others they may not.

The Commission also believes, however, that the problem could be overcome by amending the Act to enable the Secretaries of Commerce and the Interior to issue permits authorizing the taking of marine mammals, including depleted species, incidental to filming for either educational or commercial purposes under certain conditions (e.g., when the effects on individuals and populations clearly would be negligible). Thus, photography would continue to be allowed without permit where no harassment takes place, incorporated under scientific research permits when appropriate, and authorized as an independent activity when impacts would be negligible.

Another major problem with the existing statutory scheme for authorizing scientific research permits is the lack of any means for waiving the 30-day public notice and comment requirement. In some situations the Secretaries' inability to expedite permit issuance has delayed research necessary to detect, understand, or alleviate known or possible threats to marine mammals. In other instances, unique or unanticipated research opportunities have been lost because a permit could not be issued quickly enough.

To address these problems, the Commission believes that it would be desirable to amend the Act to authorize the Secretaries to issue permits before the end of the 30-day public comment period when delaying initiation of research could result in harm to a species, population, or individual marine mammal, or result in loss of unique research opportunities that could not reasonably have been foreseen. As with the parallel provision of the Endangered Species Act, which authorizes waivers of the public comment period for permits when delay would threaten the health or life of an endangered animal, the Secretary should be required to publish a notice of such a waiver, and the reasons for it, in the Federal Register within 10 days of permit issuance.

The Commission believes that the other problems with the scientific research program identified by the workshop

participants, e.g., reporting requirements placed on permittees, can be addressed administratively.

Another issue related to scientific research is the proposal that the Marine Mammal Protection Act be amended to prohibit invasive and lethal research on marine mammals unless it will directly benefit the species in the wild.

While the Commission agrees that invasive and lethal research techniques should not be used needlessly, we strongly believe that, in addition to research designed to benefit wild marine mammal populations, use of lethal or invasive techniques might at times be necessary and appropriate when conducting some types of basic research. In all instances, however, the existing statutory provisions would be applicable to ensure that such techniques will not be used when non-lethal or less invasive methods are practicable.

Public display

In testimony presented to the Senate Committee on Commerce, Science, and Transportation on 28 July 1993, the American Association of Zoological Parks and Aquariums, representing the public display industry, and the Humane Society of the United States, representing several environmental and animal welfare organizations, proposed several amendments to the public display provisions of the Act. The Commission would like to comment on the principal amendments advocated by these groups.

The American Association of Zoological Parks and Aquariums and the Humane Society each thought changes were needed in the current jurisdiction for captive marine mammals. The American Association of Zoological Parks and Aquariums believes that all authority for captive marine mammals should be vested in the Animal and Plant Health Inspection Service. The Humane Society believes that all authority should be placed with the National Marine Fisheries Service. While not explicit in its testimony, it may be that the Humane Society is advocating that the National Marine Fisheries Service be given authority over all captive marine mammals including those that are otherwise under the jurisdiction of the Fish and Wildlife Service.

Currently, jurisdiction over most captive animals, including marine mammals, is vested in the Animal and Plant Health Inspection Service under the Animal Welfare Act. In addition, section 104(c)(1) of the Marine Mammal Protection Act, which requires marine mammal permits to specify "the methods of capture, supervision, care, and transportation which must be observed pursuant to and after such taking or importation," confers jurisdiction over those captive marine mammals held under permit to the National Marine Fisheries Service and the Fish and Wildlife Service. Also, the Marine Mammal Protection Act's

definition of "take" does not limit the occurrence of a take to the wild. Since 1979, when they entered into a memorandum of agreement, the three agencies have recognized shared jurisdiction over captive marine mammals under the two statutes.

A recent district court ruling (Mirage Resorts v. Franklin), however, has placed in doubt the authority of the National Marine Fisheries Service and the Fish and Wildlife Service over captive marine mammals. The court concluded that Congress, in enacting the Marine Mammal Protection Act, intended the Act "only to apply to marine mammals in the wild." Consistent with this view, the court ruled that the National Marine Fisheries Service lacks authority to regulate swim-with-the-dolphin programs, "as such programs do not involve a 'taking' of the marine mammals from their natural habitat in the wild." Broadening the applicability of its decision, the court also found the Service's position that its "regulating authority covers the purchase, transportation, and continuous care of previously captured animals [to be] untenable."

In contrast, the court found that the Animal and Plant Health Inspection Service has broad authority over captive marine mammals under the Animal Welfare Act. In this regard, the court ruled that nothing in its order "should be construed as a prohibition on the Animal and Plant Health Inspection Service from issuing regulations regarding [swim-with-the-dolphin] programs."

Another aspect of the Mirage ruling needs to be called to the attention of this Committee as it considers amendments to the Marine Mammal Protection Act. The ruling may have unforeseen consequences for facilities seeking to transport, purchase, and sell captive marine mammals. Under section 102(a)(4) of the Act it is unlawful for any person to transport, purchase, sell, or offer to purchase or sell any marine mammal unless it is authorized pursuant to another provision of the Act, e.g. under a public display permit. If, as the court has stated, the Service is without authority to regulate transportation, purchases, sales, or anything other than the removal of animals from the wild, the Service not only would be precluded from prohibiting such activities, it would be precluded from authorizing them. That is, there may be not any mechanism to overcome the statutory prohibition against transporting, purchasing, and selling marine mammals, if, as the court has ruled, the Service has no jurisdiction to authorize such activities. Even if it does nothing else to clarify agency authority over captive marine mammals under the Marine Mammal Protection Act, Congress should give its attention to this de facto prohibition on transporting, selling, and purchasing marine mammals.

As to the underlying question of which agency or agencies should be given jurisdiction over captive marine mammals, the

Commission believes that split jurisdiction has, for the most part, worked well. The Animal and Plant Health Inspection Service has broad authority for and experience with the care and maintenance of captive animals. As such, its view of captive maintenance issues is more likely to be influenced by policy concerns not specific to marine mammals. The National Marine Fisheries Service and the Fish and Wildlife Service, on the other hand, have a narrower focus, with greater expertise with respect to marine mammal biology, physiology, and behavior and the specific needs of these animals.

The Animal and Plant Health Inspection Service, through regulation, has established generic standards setting minimum requirements that all licensed facilities maintaining captive marine mammals must meet. Among other things, those standards address the physical environment of captive animals (e.g. materials, space, water quality, temperature, ventilation, etc.), the adequacy of the facility's staff and veterinary care program, and the transportation of animals. The Animal and Plant Health Inspection Service also has a corps of veterinarians who periodically conduct inspections of marine mammal facilities to ensure compliance with the standards. Although the existing standards may need updating to reflect new information on care and maintenance of marine mammals, the existence of a set of enforceable standards is extremely valuable.

In contrast, the National Marine Fisheries Service and the Fish and Wildlife Service, through their review of specific permit applications, provide closer scrutiny of individual requests to obtain and maintain marine mammals. Also, inasmuch as their review is tailored to individual circumstances, the National Marine Fisheries Service and Fish and Wildlife Service are able to respond more quickly to specific or novel situations. The Animal and Plant Health Inspection Service, on the other hand, may have to go through a lengthy rulemaking to amend its applicable regulations. For example, the National Marine Fisheries Service has filled a void in the Animal and Plant Health Inspection Service regulations by adopting facility- or program-specific conditions for the use of marine mammals in interactive displays.

Also, the National Marine Fisheries Service and, to a lesser degree, the Fish and Wildlife Service, through reporting and other requirements, track the condition and whereabouts of individual marine mammals maintained under permits. For example, under the National Marine Fisheries Service's permit conditions, facilities are required to mark marine mammals so that they are identifiable, to provide annual reports describing the health and condition of animals, to report mortalities and provide necropsy reports, and to obtain authorization to sell or transfer animals. These records are maintained in a computerized data base. Without these means of monitoring the whereabouts and identities

of marine mammals, and for tracking transfers, the chances that animals could be substituted for other animals or could be housed in sub-standard facilities are increased. Likewise, there would be no data base for estimating survival rates of marine mammals in captivity. The Animal and Plant Health Inspection Service has no comparable inventory and tracking system.

Another consideration weighing in favor of joint authority for captive marine mammals is differential coverage under the two statutes. The Animal Welfare Act applies to all animals held by licensed facilities in the United States. The Marine Mammal Protection Act applies to all facilities holding marine mammals under permit. The Animal Welfare Act governs the care and maintenance of "pre-Act" marine mammals not covered by the Marine Mammal Protection Act. On the other hand, the Marine Mammal Protection Act applies to foreign facilities maintaining marine mammals under U.S. permits and to domestic facilities that, because of compliance problems, may have lost their exhibitors licenses.

In sum, the responsibilities of the three agencies with authority for captive marine mammals are largely complementary. The interagency agreement works working well and there is little duplication of effort under the two statutes. Therefore, the Commission recommends that Congress take whatever steps are necessary to clarify that jurisdiction over captive marine mammals is intended to be provided under both the Animal Welfare Act and the Marine Mammal Protection Act.

Both the American Association of Zoological Parks and Aquariums and the Humane Society also advocate an amendment with respect to interactive display of marine mammals such as swim-with-the-dolphin programs and petting pools. The American Association of Zoological Parks and Aquariums supports an amendment to authorize interactive exhibition of animals, while the Humane Society believes that all direct contact between the public and captive marine mammals should be prohibited.

The legislative history of the Act recognizes that there is a diversity of public display facilities and calls upon the Secretary to recognize and foster this diversity. Further, Congress has never seen a need to define what constitutes "public display" other than to require that an acceptable facility offer a program for education or conservation that meets industry standards and that the facility be open to the public on a regularly scheduled basis. Within this framework several types of interactive displays can be and have been authorized.

The Commission believes that interactive displays can enhance educational opportunities and supports retention of agency discretion to authorize such displays in appropriate instances. There should not, however, be a blanket authorization

given for any type of interactive display that a facility would like to establish. Rather, the Secretary should be given the necessary latitude to authorize such interactions based upon a careful analysis of the potential risks and benefits of the proposed interactive display. In this regard, there may be a need to clarify that, in authorizing interactive displays, the Secretary should weigh not only the potential risks to the health and welfare of the animals involved, but to public safety as well.

The American Association of Zoological Parks and Aquariums proposed an amendment to allow marine mammals from depleted populations to be imported for purposes of public display if the animals were held in captivity prior to the depletion designation or if the animals are captive born.

At present, the only permits that may be issued to authorize the taking or importation of depleted marine mammals are those for scientific research or enhancement. An exception from the general prohibition on importing depleted marine mammals for other purposes, e.g. public display, is made by section 102(d)(1) for marine mammals that were imported into the United States prior to publication of a proposed depletion finding. The proposed amendment would expand the exception to allow importation of a depleted marine mammal if the animal were removed from the wild prior to issuance of a depletion finding or is the progeny of a marine mammal removed from the wild prior to issuance of a depletion finding.

There are several potential problems with this proposed amendment. First, the rationale for the amendment seems to be that the original taking did not significantly contribute to causing depletion of the population and, therefore, that those who hold such marine mammals should not be penalized by foreclosing the opportunity to use or sell the mammal for purposes of public display. This is not necessarily the case. In some instances, the removal of animals for captive maintenance may have contributed to depleting the population.

Second, such an amendment should only be considered if there were an acceptable international system for identifying and tracking individual marine mammals. Without such a system, animals could be removed from the wild, "laundered" through foreign facilities or passed off as the progeny of pre-depletion animals, and imported to the United States for public display.

Third, whether or not animals were held in captivity prior to issuance of a depletion finding, it may be appropriate to limit uses of such animals to those designed to help rebuild the depleted stock. In this regard, it should be noted that importation of marine mammals from depleted stocks is permissible for enhancement purposes and that public display of such animals

may be authorized if it is incidental to, and will not interfere with, the underlying enhancement purpose.

An additional problem with this proposal is tying the exception to issuance of a final depletion finding. While the Commission does not support this proposed amendment in any form, at the absolute minimum, it should be revised along the lines of section 102(d)(1) of the Act, setting publication of the proposed depletion finding as the cutoff point by which the marine mammal must be in captivity. Without such a requirement, there is a risk that the publication of a proposed depletion finding will set off a rush to capture animals from that stock before the determination is final.

The American Association of Zoological Parks and Aquariums also advocates exempting Marine Mammal Protection Act permitting actions from the requirements of the National Environmental Policy Act.

By and large, marine mammal permitting actions do not have significant environmental impacts. As such, the National Oceanic and Atmospheric Administration and the Fish and Wildlife Service have "categorically excluded" the issuance and modification of these permits from the general National Environmental Policy Act provisions requiring preparation of an Environmental Impact Statement (EIS) and/or an Environmental Assessment (EA). Pursuant to the categorical exclusions, most permits may be issued without conducting an assessment of their impacts.

Some permits, however, may fall within exceptions to the categorical exclusions because of the scope, novelty, uncertainty, or cumulative impacts of the requested activities. In such instances, preparation of an EA or an EIS is required. While some may view this requirement as a needless obstacle to permit issuance, preparation of such a document in those circumstances serves a valuable function. The required analyses not only assess the potential impacts of proposed actions, but identify alternatives that may be environmentally preferable.

It should also be noted that compliance with the National Environmental Policy Act, at least for most permits, is not very burdensome. Of the hundreds of permits issued by the National Marine Fisheries Service, only a handful have required preparation of an environmental document -- and these generally were for relatively large scale activities, e.g. the Heard Island sound transmission experiment, the Minerals Management Service's bowhead whale research program, the swim-with-the-dolphin program, and a proposal to capture up to 100 and remove 10 killer whales from Alaska. Only two permits issued by the Fish and Wildlife Service have prompted the preparation of an EA and none have required the preparation of an EIS.

While the amendment sought by the American Association of Zoological Parks and Aquariums would clear up any uncertainty about the applicability of the NEPA requirements to individual permits, it would do so at the expense of the benefits that result from NEPA analyses in exceptional circumstances. A better approach would be to strengthen the system used by the Services to identify when exceptions to the categorical exclusions are present.

The Humane Society supports an amendment to prohibit further captures of wild marine mammals for public display purposes. The Humane Society contends that there are already sufficient numbers of certain marine mammals in captivity (e.g. Tursiops) to furnish the needs of the public display industry through captive breeding. For some pinniped species kept in captivity, the demand for display animals can be met by captive breeding or by stranded animals that are unreleasable to the wild.

The proposed amendment, however, is overly broad. While the demand for public display specimens from some species can probably be met from captive breeding, a reduction in the size of the Navy's marine mammal program, and from unreleasable stranded animals, this is not universally the case. The proposed amendment would have the practical effect of limiting public display opportunities to those species now commonly held in captivity or prone to stranding. Even for some commonly held species, the captive population may not be sufficiently large to allow breeding in perpetuity without a periodic infusion of genetic variability from wild populations.

A more pragmatic approach would be to amend the Marine Mammal Protection Act to require the Secretary, when reviewing applications for public display permits to consider whether there are practical alternatives to the removal of animals from the wild. Only in those cases where it is reasonably demonstrated that taking animals from a wild population is necessary should removals be authorized.

The Humane Society also seeks to amend the Act to prohibit the intentional feeding of marine mammals in the wild.

The Marine Mammal Commission has long held the view that the feeding of marine mammals in the wild may be harmful and constitutes a prohibited taking under the Act. Among the considerations that led the Commission to its conclusion are that feeding programs may (1) cause animals to be attracted to fishing boats and other vessels, increasing the likelihood that they will become entangled in fishing gear, be struck by vessels, or be shot, poisoned, or fed foreign objects; (2) cause animals to become dependent on such food sources and become less able to find and catch natural prey when feeding is discontinued; (3) alter migratory patterns, thereby subjecting animals to food

shortages or inhospitable conditions that otherwise would be avoided; (4) condition animals to expect food from people, possibly causing aggressive behavior when food is not offered; and (5) expose animals to and make them more susceptible to disease.

In 1991, the National Marine Fisheries Service issued a rule to include feeding wild marine mammals within the regulatory definition of taking. While this rule was successfully challenged in district court, that finding was overturned by the Fifth Circuit Court of Appeals in October 1993. As such, there no longer appears to be a need for such an amendment.

Another recent case (United States v. Hayashi), which also looked at the issue of taking by harassment under the Marine Mammal Protection Act, should be called to your attention. In this case, the Ninth Circuit Court of Appeals overturned the conviction of a fisherman for allegedly taking porpoises by shooting at them to deter them from interacting with his gear and catch. For the reasons noted below, the court's ruling is problematic.

Noting that the term "harass" was not defined in the statute or by applicable regulation, the court ascertained its meaning by examining the other elements of taking (hunting, capturing, and killing) included in the Act's definition of "take." Inasmuch as those elements all involve "direct, sustained, and significant intrusions upon the normal, life-sustaining activities of a marine mammal," the court concluded that "'harassment,' to constitute a 'taking'...must entail a similar level of direct and sustained intrusion." Reviewing the facts of the case, the court concluded that shooting at the porpoises did not have the significance or sustained effect to be a taking under the Act and reversed the conviction for insufficiency of evidence.

A dissenting opinion took issue with the majority's reasoning and the scope of the ruling. The dissenting judge believed that the majority, in order to overturn a conviction it thought unreasonable, had unjustifiably restricted the breadth of the Act. The dissenting judge found "no source in the language, structure, or legislative history of the Act" to support "the gloss imposed by the majority" on the taking definition. Further, the judge thought that the majority's cramped construction of the term "taking" would unjustifiably "restrict most aspects of the scheme envisioned by Congress for the protection of marine mammals."

Concerned with the application of the Hayashi ruling to other factual settings and the implications of the ruling on its ability to enforce the Act effectively, the Government, on 9 November 1993, petitioned the Court of Appeals to rehear the matter. While not objecting to the reversal of the conviction on

other grounds, the Government took issue with the court's narrowing of the "take" definition. While it is hoped that the court will reconsider its opinion, this is an issue that bears watching by Congress. If the holding limiting the definition of harassment to direct and sustained intrusions on marine mammals is left intact, legislation to include lesser forms of disturbance and molestation under the definition would be warranted.

Alaska Native Issues

From our discussions with representatives of Alaska Native groups it appears that they are primarily concerned with three issues related to reauthorization, other than the proposed regime to govern the taking of marine mammals incidental to commercial fishing operations. First, they seek to ensure that the current exemption allowing the taking of marine mammals for subsistence and handicraft purposes is maintained. Second, Native communities would like to build on current efforts to enhance cooperation between the Alaska Natives and the Fish and Wildlife Service in managing polar bear, sea otter, and walrus populations in Alaska. Third, they would like to have the Act amended to allow the importation of marine mammal products that: a) were exported from the United States in conjunction with personal travel; b) were acquired by an Alaska Native outside the United States as a gift from a Native inhabitant of Russia, Canada, or Greenland; or c) are being imported by Native inhabitants of Russia, Canada, or Greenland in conjunction with their personal travel or as gifts for Alaska Natives.

The Commission supports retention of the existing exemption for Alaska Natives. As was recognized by Congress when the Act was passed in 1972, traditional uses of marine mammals by Alaska Natives should be protected and given primacy over other uses. Although there have been problems from time to time with the current system, Native communities have worked hard to eliminate them.

The Commission believes that cooperative efforts between appropriate governmental agencies and Native groups provide the best long-term solution for managing the take of marine mammals for subsistence and handicraft purposes. Native communities have expressed a willingness to work with the Service to ensure that levels of take do not adversely affect the populations.

Informal discussions with the Service indicate general support for this approach. However, the Service has suggested that more explicit authority is needed to enable it to make grants or provide other financial assistance to Alaska Natives participating in such cooperative management activities. While the Commission agrees that such activities should be funded, it does not believe that a substantive amendment is needed, although

it may be useful to note this in report language.

Section 110 of the Act authorizes the Secretary to make grants or otherwise provide financial assistance to any Federal or State agency, public or private institution, or other person for the purpose of undertaking research relevant to the protection and conservation of marine mammals. In addition, the Secretary has broad authority under section 112(c) to enter into contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the purposes of the Act. There can be little doubt that financial assistance to Alaska Natives to develop cooperative management plans and to participate in cooperative management activities to protect and conserve marine mammals can be provided under these provisions.

Further in this regard, the Commission believes that the ongoing development of conservation plans for the polar bear, sea otter, and walrus, provide the appropriate context in which to identify cooperative efforts that should be undertaken and to assess and justify needed funding.

The amendment to authorize importation of certain marine mammal items is similar to one introduced by Senator Murkowski in the last Congress. That proposed amendment would have 1) authorized Alaska Natives to import into the United States gifts containing marine mammal parts received from Natives of other countries; 2) allowed anyone who legally possesses a marine mammal product in the United States to obtain permission to export, and subsequently re-import, the item; and 3) authorized the issuance of permits for the temporary importation of marine mammal parts into the United States if the importation is associated with an organized cultural exchange.

Such an amendment would likely have little effect on marine mammal populations, but would have important benefits to Alaska Natives by fostering relations among circumpolar Natives. Senator Murkowski's bill contained most of the safeguards necessary to prevent abuses of the proposed exceptions. With a few minor modifications, enactment of such an amendment is supported by the Commission.

The Murkowski bill would have required an Alaska Native importing a gift containing marine mammal parts to register that item with the Secretary. Consideration should also be given to requiring other Alaska Natives to whom such items might be transferred to re-register the item. Also, while the bill implied that items to be exported and re-imported into the United States must be legally possessed by the owner, this should be made an explicit requirement of the provision.

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Agreement on the Conservation of Polar Bears

Committee staff have been provided with copies of a report prepared for the Commission on reconciling the legal mechanisms to protect and manage polar bears under domestic statutes and the Agreement for the Conservation of Polar Bears. That report suggests several amendments that could be made to the Marine Mammal Protection Act and the Agreement to bring them into full conformance. Among other things, Congress might consider amending the Act to prohibit using aircraft or large motorized vessels to take or assist in the taking of polar bears, to prohibit hunting of polar bear cubs or females with cubs or in denning areas, and to strengthen protections for polar bear habitat. Among other things, habitat protection under the Marine Mammal Protection Act could be enhanced by including the term "harm," including harm that results from habitat degradation or modification, within the definition of "take."

TESTIMONY OF

THE AMERICAN ZOO AND AQUARIUM ASSOCIATION

AND

THE ALLIANCE OF MARINE MAMMAL PARKS AND AQUARIUMS

PRESENTED BEFORE

THE SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

ON

10 February 1994

TESTIMONY OF THE
AMERICAN ZOO AND AQUARIUM ASSOCIATION
AND THE ALLIANCE OF MARINE MAMMAL PARKS AND AQUARIUMS

The 162 accredited members of the American Zoo and Aquarium Association ("AZA") and the 31 members of the Alliance of Marine Mammal Parks and Aquariums ("Alliance") represent zoos, aquariums and scientific research facilities which further the goals and objectives of marine mammal conservation through the public display of, and research regarding, marine mammals. In 1992, over 115 million people visited Alliance and AZA facilities. The Alliance and the AZA strongly support the Marine Mammal Protection Act ("MMPA") and appreciate this opportunity to share information about our members' educational, research, and stranding rescue programs and to discuss the MMPA.

I. The Public Display and Scientific Research Community Contributes to Marine Mammal Conservation.

A. Education.

To the millions of people who visit our facilities, we offer an otherwise unattainable learning opportunity. Millions of people walk away from our facilities with a strong and determined interest in assuring that marine mammals are safe and protected in the wild. Visitors learn about the importance of conservation, responsible human behavior, principles of ecology, animal communication, and natural behaviors.

Zoological parks and aquariums serve as learning centers for the 115 million people who visit our facilities every year. Eight million schoolchildren visit zoos and aquariums as part of their school year curriculum, and another 2 million participate in outreach programs. Thirteen million adults and children take part in formal and informal education programs. Another 8-9 million will have the opportunity this year alone to benefit from a new and progressive educational satellite television series. Using cable television one facility aired eight programs during the 1992-93 school year which featured live host educators, up close footage of marine mammals, interviews with marine mammal experts and the opportunity for students to ask questions using a toll free number. In addition to these programs, 25,000 teachers are given in-service training by zoos and aquariums each school year.

AZA accredited zoos and aquariums also conduct international training programs for zoologists and wildlife managers, support local education programs, and provide fellowships, internships, and student grants. They also donate their time, materials and equipment to conservation education projects in developing countries. In 1990-1991, AZA member institutions initiated or supported 45 educational programs in 24 nations worldwide.

An October, 1992 nationwide poll by the Roper Organization shows the public is in near unanimous agreement (92%) that marine life parks play an important role in educating the public about marine mammals and environmental conservation. Significantly for the cause of marine mammal conservation, 86% feel if the public learns more about marine mammals, they are more likely to become concerned about marine mammal conservation.

The results of a 1992 Canadian poll paralleled the Roper survey. Eight of ten people surveyed by Decima Research described their visit to an aquarium as educational.

AZA and Alliance zoological parks and aquariums open to the public typically have professional educators on staff. Exhibit graphics are designed in cooperation with these professionals. Trained presenters answer the questions we know from experience our guests will raise based on visitor research. Habitat themes are enhanced through interpretive graphics, illustrated guidebooks, and narrated programs, to name a few. High tech computer simulations and video presentations augment educational messages. Surveys and studies of structured classroom groups back up the hypothesis that contact with live animals improves learning and retention. Above and beyond models and preserved specimens, contact with live animals improves attitudes towards them. Visitors to zoos and aquariums to see whales and dolphins should be viewed as a "link in a chain of learning."

Visitors to AZA and Alliance facilities begin learning the moment they enter. For many people, visiting an AZA or Alliance facility is often their first and only experience with marine mammals. This experience, coupled with the unique educational materials they see, instills in visitors an awareness of ecological and conservation issues, not only about marine mammals, but also about invertebrates, sharks, fish, turtles, birds, oceanography, coral reef ecology, endangered species and more.

At some facilities, graphics and narrated presentations are supplemented by demonstrations in which a teacher discusses animal behavior while trainers help the animals demonstrate the behavior.

In addition to our programs for the general public, most AZA and Alliance members offer specially designed educational programs prepared by experienced teachers. Programs are offered for the blind, students who speak foreign languages, gifted students, preschoolers, autistic children, and teachers and professors at the elementary, undergraduate and graduate levels, as well as adults of all ages.

For schools which cannot bring their students to us, some AZA and Alliance members have developed auditorium programs and other outreach programs. We often send a curriculum aid packet in advance of the trip to assure that the educational benefits of the visit are optimized.

Outreach programs are not confined to the communities in which Alliance and AZA facilities are located. Educational material available by mail include curriculum guides, activity packets, educational posters, flashcards, illustrated information booklets, fact sheets, and educational videos. Alliance and AZA members are working with the National Education Association, the National Science Teachers Association, and the National Marine Educators Association to publicize these programs.

Every month, hundreds of letters from school children arrive at our zoos and aquariums. Ashley, from Connecticut, writes "I would like to help save the whales, but in order for me to do that I need you to help me. Please tell me how I can help." Brandi from Ohio, tells us "When I grow up I want to be a marine biologist."

After a week's course in Florida to learn about marine mammals, students from Denver organized a slide show for their English and social studies classes calling for a tuna boycott to protect dolphins.

The California State Superintendent of Public Instruction wrote another public display facility saying he was particularly impressed with their "curriculum materials that integrate the academic disciplines of mathematics, science and social science."

One parent accompanying her child to a park commented that "close contact with dolphins makes the whole issue come alive for (children). Protecting wildlife becomes more real and therefore encourages more effort and activism."

The Education Program Coordinator of the Hawaiian Humane Society complimented another marine life park on its contributions to seminars for local educators on "Animal Education Programs."

These comments are typical of the positive public response to the programs offered by AZA and Alliance members.

B. Research.

Research is also an essential element of the program at zoos and marine mammal parks and aquariums. Much of what is known about marine mammal biology, physiology, reproduction and behavior results from scientific research conducted by public display facilities.

Generally, research by Alliance and AZA members falls into two categories -- onsite projects and field research.

On-site projects are often aimed at improving animal husbandry knowledge including health information, diet and reproductive biology. This type of research continues to assure that our marine mammals are housed in the best-designed habitats.

Captive breeding programs are also implemented at AZA and Alliance facilities as part of a more holistic effort to preserve species in their natural habitats. Conservation of the world's wildlife and its habitat is the highest priority of AZA. The association's conservation activities were initiated with the development of the Species Survival Plan (SSP) in 1981. The SSP now manages cooperative breeding programs for 64 species. The Marine Mammal Taxon Advisory Group (TAG) was recently formed to prioritize marine mammal species for captive propagation and recommend species for which new studbooks and SSPs should be developed.

The Marine Mammal TAG is composed of a diverse group of experts including representatives from other conservation organizations, field biologists and zoological professionals. This insures that the best informed recommendations on captive propagation management will be made. The designation of priority species for captive breeding is based on captive population size, available space for propagation, breeding success, status in the wild, genetic viability of the captive population, and ultimately, the long range outlook for enhancing or reestablishing native populations in the wild.

The second category of research is field research. Findings are presented at professional meetings and then published in scientific journals. In this way, our research benefits government, environmental and conservation groups throughout the world.

In the past five years, Alliance and AZA members have spent over $20 million on marine mammal research. Over the past 25 years, our members have published over 1,600 research studies and presented the results to professional organizations and conferences.

Research projects undertaken by Alliance and AZA members have achieved breakthroughs which benefit all marine mammals, including wild populations. For example:

- The marine mammal community has developed specialized vitamin and nursing formulas for young animals born in zoological environments that have been used to increase the survival of young abandoned by their mothers in the wild.

- Fuel oil is no longer added to off-shore oil drilling fluids because the Edgerton Research Laboratory, an integral part of the New England Aquarium, identified number 2 fuel oil as the most toxic component in oil drilling fuel mixtures.

- Studies of the food intake rate and reproductive biology of the northern fur seal have contributed to the overall knowledge of this species, now designated as depleted.

- Researchers tested a satellite-linked radio transmitter allowing scientists to learn more about the ranging patterns of dolphins in the open waters of the Gulf of Mexico.

- The Long Marine Laboratory is currently training California sea lions to swim with gray whales and tape whale behavior with video cameras. By studying gray whale behavior, researchers hope to acquire information that will protect the whales in their natural environment as well as protect the habitat they require. This research is being underwritten, in part, by the National Geographic Society.

- Collaborative efforts between the University of Hawaii and a marine mammal facility have resulted in a test to identify concentrations of the deadly ciguatoxin in the blood of humans and animals. Early detection and treatment is now possible for people and marine mammals

that have ingested fish tainted with toxin.

- Scientists have worked with the Air Force to study the effects of aircraft noise on birds and marine mammals.

- A study was done with the National Institutes of Health and others to determine how harbor seals may avoid heart disease even though their all sea-food diet is high in protein and fatty acids. This study is being used to provide clues as to how humans can fight heart disease, the number one killer of adults.

- Another facility initiated collaborative research which led to the identification of seal influenza in the North Atlantic.

The health maintenance research done at marine mammal facilities is also essential for treating sick and stranded animals. Without knowledge of marine mammal health and physiology, and without the techniques necessary to help these animals, successful rehabilitation would be impossible.

C. **Helping Stranded Animals**.

Many Alliance and AZA members voluntarily participate in federally-sponsored stranding response networks organized by the National Marine Fisheries Service. Because of their extensive expertise with marine mammals, Alliance and AZA members are called upon by the public, local animal welfare organizations, and state and federal regulators to respond to animals in distress through strandings and injury.

Annually, thousands of marine mammals are reported as stranded on the coasts of the United States. Efforts to save these animals and generate scientific knowledge are almost exclusively due to the dedication of the institutions and individuals of the Stranding Network who receive no payment for their efforts. One Stranding Network member, Sea World, spent $3.4 million over the last five years rescuing 2,728 animals, including birds and other animals as well as cetaceans. Of those animals, 1,307 were rehabilitated and 1,080 were released.

The New England Aquarium currently responds to approximately 500 strandings each year, including mass strandings of 30-90 pilot whales. The aquarium provides rescue and rehabilitation services, and has returned pilot whales to their habitat. It has also assisted more that 50 seals of 5 different species, returning many to the wild. Direct costs of these efforts are estimated to be $100,000 per year, in addition to thousands of hours of trained volunteer help.

There are many other examples of rescue efforts, including a west coast sea otter rescue and care program designed to rehabilitate and return abandoned pups and sick and injured adults to their natural environment.

The marine mammal community is not reimbursed for the expenses associated with the medical treatment of stranded animals, -- and stranding operations are costly. In the last five years, Alliance and AZA members alone have spent over $5 million rescuing, treating, feeding and releasing marine mammals. As a result of efforts by the public display community and others, 1,500 marine mammals were returned to their natural environments in the last five years. Sadly, stranded animals are often severely injured and would not be able to survive in the wild. These animals, most of which are not suitable for display, are maintained at Alliance and AZA facilities at their own cost.

In addition to responding to calls to assist stranded marine mammals, it is not uncommon for a single Alliance or AZA facility to receive over 1,500 calls a year regarding marine mammals, birds and other wildlife in distress. Nor is it uncommon for the animals care staff of these facilities to examine large numbers of animals that succumbed in a mass die-off. Staffs are on call 24 hours a day, seven days a week.

AZA and Alliance members have also long understood that the study of stranded animals is important to protect marine mammals in the wild. This work provides essential data about the natural history of a species and population dynamics, and is an indicator of factors affecting these animals such as disease, pollution and parasites. Thus, when animals are released, they are marked for re-identification and many are radio/satellite tracked by federal agencies to gather still more data to help other animals.

Another example of stranding related research now being done with a wild population is a project evaluating the health of the Matagorda Bay, Texas dolphin population, which suffered an unusual mortality event in the spring of 1991. Public display community veterinarians participating in the study, which is funded by the National Marine Fisheries Service, have

reported to NMFS that his project presents a strong foundation upon which to understand subsequent events.

AZA and Alliance members make substantial contributions to the rescue, rehabilitation and release of stranded marine mammals. In fact, the accumulated knowledge, collective experience and resources of AZA and Alliance facilities are primary factors in these rescue efforts.

II. **Public Display Facilities Contribute to Their Communities.**

AZA and Alliance members contribute substantially to the communities in which they are located through the thousands of people they employ, the millions of dollars spent on goods and services, the monies paid and generated in taxes, increased tourism, and the additional dollars spent in the community by visitors.

Alliance members pay over $55 million in various taxes annually. Employment taxes are paid to the Federal government, states, municipalities and counties as well as taxes and fees for water, sewer and utility usage and telephone service. Taxes paid by visitors and collected by these facilities for remittance to the appropriate government entity include those for food at restaurants, sales at gift shops and entertainment taxes on gate receipts. For-profit institutions also pay municipal property taxes and sales taxes.

In addition, Alliance facilities spend another $250 million yearly on the purchase of goods and services and provide thousands of jobs. Over 12,000 people are employed in full or part-time positions.

Annually, AZA members make over $440 million in capital improvements to their facilities. More specifically marine parks have invested over $1.2 billion in their communities through construction, continuing expansion and maintenance of their operations.

Studies done by individual AZA and Alliance members clearly demonstrate that public display institutions have a significant positive impact on their local communities and states. Based on an economic impact study, the New England Aquarium, for example, estimates total off-site spending by visitors to its facility is more than $289 million. This off-site spending is believed to generate $8.7 million in sales and use taxes. Similarly, Marine World Africa U.S.A. in California estimates it generates an estimated $95-105 million for the local economy annually.

The benefits to the community from marine mammal public display facilities, either in direct payments and taxes, other generated revenues, economic multipliers, employment opportunities, tourism, business and infrastructure growth, are significant financial ones. More difficult to evaluate, yet equally important, is the community identity and civic pride that comes from being the home to each of these zoos, aquariums, oceanariums and marine life parks.

III. Public Attitudes Toward Zoos and Aquariums.

An October 1992 nationwide poll by the Roper Organization showed that Americans believe public display facilities play a positive role in protecting animals and wildlife and in educating the public about the animals and environmental conservation. Four in ten Americans said they have visited an aquarium, animal theme park, or zoo in the past year. 80% said they enjoyed going to public display facilities and one in six actually contributed financial support.

There is near unanimous agreement (92%) that public display facilities play an important role in educating the public about marine mammals and their environment. 91% of the people surveyed agree that aquariums and zoos provide children with an important opportunity to learn about wild animals and are important in educating children about these animals.

These findings by the Roper Organization were confirmed in a recent Canadian poll. Eight of ten people surveyed by Decima Research considered public display facilities to be educational.

Perhaps the most significant finding of the poll was that 86% believe if the public learns about animals at zoos and aquariums, they are more likely to become concerned about protecting these animals and their habitat. Interestingly, two thirds of the public consider it important, if mot essential, to entertain visitors while they learn about animals.

The vast majority of people surveyed feel that aquariums and zoos play an important role in preserving animals and that studying animals in captivity helps develop sound conservation programs for animals. Further, the public credits public display facilities with most of the successes that have been realized in saving endangered species.

The public supports the public display of marine mammals as an important tool in conserving marine mammals and their environment.

IV. AZA Accreditation Program and Code of Professional Ethics.

The AZA monitors the activities of its members through an accreditation program. One of the foremost objectives of the AZA is to maintain high professional standards and to influence continuing growth of superior zoological parks and aquariums. In developing and updating its accreditation program, the AZA is especially concerned with the need for high standards of animal management and husbandry. This objective is paramount in the maintenance and care of living collections. Good conscience permits no higher priority. The Accreditation Commission also accords special attention to how these living collections are used.

Accreditation certifies that an institution is currently meeting standards established by the Association and is based upon the informed judgment of experienced individuals within the profession. Zoological parks and aquariums must qualify for accreditation at least once every five years. Facilities may be inspected during the five year period if suspected problems are presented to the AZA.

Both institutional and individual members are bound by the AZA Code of Professional Ethics. This Ethics Code was developed by the profession and is the standard by which proper conduct is measured.

The AZA Ethics Board, composed of 9 professional AZA members elected by the voting membership is responsible for developing and maintaining the Code, as well as investigating formal written complaints of Code violations and initiating investigations on its own. Anyone can bring an ethics charge against an AZA institution. Based on the results of these investigations, the Ethics Board makes recommendations for appropriate action to the Board of Directors.

The Code includes obligations of professional ethics and mandatory standards. Deviation by a member from the Code of Professional Ethics is considered unethical conduct and the member becomes subject to investigation by the AZA's Ethics Board and, if warranted, to disciplinary action.

The AZA is always refining and revising its ethics guidelines based on the professional expertise of its membership. For example, last spring, the AZA and Georgia Tech University convened a conference to consider ethical issues facing the Species Survival Plan. Funded by a grant from the National Science Foundation, the conference brought together nearly 50 experts in animal welfare, wildlife conservation and management, environmental ethics, and zoo biology to

discuss ethics surrounding captive breeding, display design, surplus animals, behavioral enrichment and other relevant topics. Much progress was made and the conference results will be published by the American Association for the Advancement of Science.

V. **NMFS Proposed Regulations.**

The National Marine Fisheries Service ("NMFS") recently issued proposed regulations on public display of marine mammals. The NMFS proposed regulations represent a major public policy shift from the current scheme for regulating activities that affect marine mammals and, if finalized, would create significant new regulatory requirements and a new federal bureaucracy. The proposal is extraordinarily far reaching and would certainly require a considerable increase in NMFS' resources.

The NMFS proposal amends the definition of "take" to include holding a marine mammal captive. The proposed definition would require a facility to apply for a permit and/or authorization every time they transfer, purchase, hold, or sell a captive marine mammal. The redefinition of "take" ignores Congressional intent of the MMPA. The Act, its legislative history, NMFS' own precedents and Court decisions agree "take" means activities in the wild. The 1972 Committee Report refers to "take" as activities in the wild. In 1974 when NMFS issued its first regulations, the Office of the General Counsel issued an opinion stating that "take" did not apply to animals already in a zoological environment. This position was reaffirmed in a 1975 General Counsel's Opinion. NMFS' Annual Reports to Congress repeatedly state that the term "take" did not apply to animals already removed from the wild. The only court which has considered the meaning of the term "take" held that it only applies to activities in the wild.

NMFS is now also arguing it has authority to establish care and maintenance standards for captive marine mammals. These standards would include standards for the animals and for facility and equipment design as well as for hiring personnel. The Animal and Plant Health Inspection Service ("APHIS") already has established care and maintenance standards under the Animal Welfare Act. There is no need for another care and maintenance standards. If there are problems with APHIS' administration of the regulations, then APHIS should be given more resources to carry out their duties. Moreover, APHIS is in the process of reviewing their care and maintenance standards by using the formal negotiated rulemaking process.

The NMFS proposed regulations also contain excessive and probably unconstitutional regulation over educational programs. According to the MMPA, NMFS does not have authority to regulate the content of educational programs. Nonetheless, under the proposed regulations,

NMFS would have the authority to close down or compel changes in a zoo or aquarium program that, in the agency's view, is not "accurate" or "consistent with the policies and objectives of the MMPA" or is not conveyed "in an effective manner." The terms "accurate", "consistent" or "effective" are based on subjective judgment which cannot be made without unconstitutionally, examining the content of a facility's educational program.

Significant areas of the proposed regulations exceed the statutory authority granted NMFS in the MMPA. For example, NMFS intends to require permit holders to post a $10,000 surety bond (or make equivalent arrangements) for each animal they hold. This bond is intended to offset the costs of caring for the animals should a facility terminate operations or its permit be withdrawn. We are unaware of any statutory authority to support the imposition of a bond requirement.

The proposal requires each facility to obtain a five-year permit. This permit is nothing more than permission to apply for yet another authorization since permissions granted under the five-year permit cannot be exercised until additional authorizations are obtained. We believe this is a fundamental flaw in the regulations and can only be solved by eliminating the facility permit and defining NMFS' authority as the protection of animals in the wild. In addition to a five year permit, the NMFS proposal requires a series of required authorizations and notifications, thus creating a very cumbersome process. For example, an importation of a marine mammal requires that requests for an authorization to import be submitted to NMFS headquarters at least 30 days prior to the proposed event and specify or include certain information. Assuming both facilities are permitted under the NMFS regulations, the same information must be resubmitted to NMFS three weeks before the transfer and again one week before. And much of the information must be submitted by both parties to the transfer and importation. Why isn't it sufficient to have the information submitted once by one party?

Finally, AZA and Alliance members are concerned that the proposed regulations threaten the good work they do. A recent economic impact study conducted by Arthur D. Little, Inc. showed that the proposed regulations would increase costs for the zoological community by more than $32 million over five years. This figure represents the impact on the zoological community alone; it does not include the impact on the scientific community or the costs to NMFS of implementing this new system. If these regulations were finalized, the resources (staff time and operational dollars) of AZA and Alliance members, would be directed away from animal care, research and caring for stranded animals and redirected towards duplicative paperwork and probably increased litigation.

We believe that the NMFS' proposed regulations, the need to eliminate government duplication and to streamline the regulation of activities involving marine mammals, provide a compelling need for the MMPA to be amended.

VI. MMPA Amendments.

AZA and Alliance members recommend that the MMPA be amended to:

1. Clarify that each offer to sell or purchase a marine mammal, the signing of a purchase or sale contract, etc., by persons already holding valid permits for scientific research, public display, or enhancing the survival or recovery of a species or stock is not a separate taking requiring yet another permit.

   Explanation of Amendment: In Kama, et al. v. The New England Aquarium, et. al., the plaintiffs argued the MMPA prohibits the transport, sale, purchase, offer to purchase, offer to sell, and possession of a marine mammal without separate permits to "take" the marine mammal. Under the plaintiffs' theory, each step of a purchase and sale transaction would require a new permit because each separate action is a "take". Although that suit was dismissed because the plaintiffs lacked standing, the MMPA requires clarification to prevent other similar suits.

   The only court which has considered the precise question of whether the term "take" is limited to activities in the wild reviewed the language of the MMPA and its legislative history, examined the agency's interpretation of the MMPA concurrent with its passage, and ruled that the term "take" means taking from the wild and does not apply to animals in captivity.

   As originally passed, the Act made it illegal to possess, sell, purchase, offer to sell or purchase, and transport a marine mammal only if the animal was taken in violation of the MMPA. During the 97th Congress, the MMPA was amended to make the purchase, sale, offer to purchase or sell and transport illegal regardless of whether the marine mammal was taken legally. That amendment was intended to address enforcement issues associated with subsistence takes. This change has led to unintended litigation, such as the case discussed above, as to whether the public display community needs additional permits to transfer legally taken animals. The proposed amendment, together with the conforming amendments,

returns the MMPA to its original purpose while still addressing the subsistence enforcement issue.

Under our amendment, NMFS would still receive notification of movement of animals and institutions would still submit an annual inventory report to NMFS.

2. Codify the existing practice of NMFS and the Fish and Wildlife Service under which the taking of animals from the wild is regulated by NMFS and FWS while their subsequent care and maintenance is regulated by the APHIS under the Animal Welfare Act.

   Explanation of Amendment: This amendment codifies the existing practice of the NMFS and the Fish and Wildlife Service under which the taking of animals from the wild is regulated by NMFS and FWS while their subsequent care and maintenance is regulated by APHIS under the Animal Welfare Act. In the NMFS proposal, NMFS asserts the authority to set new care and maintenance standards for marine mammals and begins establishing such standards. Having two, and perhaps three, agencies establishing marine mammal care and maintenance standards does not make sense when Congress and the Administration are seeking to streamline government and control the deficit.

VII. Conclusion.

The contributions of the public display and scientific research communities to the conservation of marine mammals and the protection of the ecosystem upon which they depend is chronicled in the millions of visitors who come to our facilities each year and who leave with a renewed dedication to marine conservation. They are chronicled in the thousands of research projects funded by AZA and Alliance members. And, they are chronicled in the vast sums spent on the rescue and rehabilitation of stranded marine mammals who would die on our beaches without the voluntary commitment of resources made by AZA and Alliance members.

AZA and Alliance members look forward to continuing their efforts under the MMPA and respectfully request the adoption of our certain clarifying amendments.

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STATEMENT OF JOHN GRANDY, PH.D.
VICE PRESIDENT, WILDLIFE AND HABITAT PROTECTION
THE HUMANE SOCIETY OF THE UNITED STATES

BEFORE THE

HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE

SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

ON MEASURES TO CONSERVE THE MARINE MAMMAL PROTECTION ACT

FEBRUARY 10, 1994

On Behalf Of:

American Humane Association
American Society for the Prevention of Cruelty to Animals
Animal Protection Institute
Council for Compassionate Governance
Earth Island Institute
The Fund for Animals
Humane Society International
The Humane Society of the United States
In Defense of Animals
International Wildlife Coalition
New England Anti-Vivisection Society
Progressive Animal Welfare Society
Society for Animal Protective Legislation
South Carolina Association for Marine Mammal Protection
Whale and Dolphin Conservation Society

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Good morning. I am Dr. John W. Grandy, vice president of Wildlife and Habitat Protection for The Humane Society of the United States (HSUS). I thank you for the opportunity to testify today on behalf of The HSUS and 14 other member organizations of the Marine Mammal Protection Coalition (MMPC) and our combined membership and constituency of over 3 million persons worldwide, regarding the issues of marine mammal public display and scientific research. MMPC member groups engage in scientific research, coordinate stranding networks, and provide interpretive educational programs about free-living marine mammals. The HSUS is the largest animal protection organization in the United States. We have ten regional offices, an educational division, a team of investigators, and legislative experts. We have substantial programs focused on providing humane stewardship for companion animals, laboratory animals, farm animals, and wildlife. The HSUS has recently established an international arm, Humane Society International, through which we will extend our programs of animal protection around the world.

We appreciate the Committee's attention to this issue and look forward to working with you, Mr. Chairman, to preserve the principles of the Marine Mammal Protection Act (MMPA) of 1972 during its re-authorization process.

INTRODUCTION

Our position has long been that under most circumstances wild animals should exist undisturbed in their natural environments. Captivity of marine mammals in zoos, aquaria, and marine parks and lethal and invasive scientific research are essentially antithetical to this position. Frequently, captivity and research result in abuse, neglect, suffering, and premature death of individual animals. Therefore, we maintain that captivity of and research on marine mammals should only be undertaken for the direct benefit of the species and that all individual animals involved should be treated in a humane, professional manner where the welfare of the individual is always paramount.

In addition, public opinion concerning human interaction with marine mammals has been changing. Documentaries, scientific research on free-living animals, wildlife photography, and films such as this past summer's "Free Willy" have encouraged and established a new public awareness of the complex nature of these intelligent, social creatures. People have begun to question, in growing numbers and in various media, the ethics or necessity of keeping marine mammals in captivity. The hundreds of thousands of calls made to the 800 number at the end of "Free Willy", as well as the proliferation of aquaria without live marine mammal exhibits, the closing of seasonal dolphin shows at many amusement parks, and the introduction of state legislation prohibiting captures of marine mammals in state waters and, in South Carolina, the outright prohibition of public display, clearly illustrate that the debate on public display is entering a new era.

SPECIFIC PROPOSALS

1. The MMPA should be amended to place primary responsibility with the National Marine Fisheries Service (NMFS) for the care and maintenance of marine mammals in captivity.

This issue is central to this re-authorization process. It is vital that primary oversight of marine mammals in captivity rests with NMFS. The Animal and Plant Health Inspection Service (APHIS) and NMFS currently share responsibility for oversight of the care and maintenance of captive marine mammals, with APHIS largely responsible for the conditions under which they are held. However, APHIS has been persistently reluctant to modify certain requirements (such as minimum social group size) for marine mammals because such requirements could then apply to all captive animal species. Such conflicts emphasize why it is inappropriate for APHIS, which has little expertise with marine mammals and an overly broad mandate, to have primary oversight of captive marine mammals, which have very specialized, species-specific requirements.

In addition, APHIS has demonstrated consistently in the past that it cannot adequately ensure the humane treatment of captive marine mammals. Several facilities, a notable recent example being the Cape Cod Aquarium in Massachusetts, have been repeatedly certified and licensed under APHIS when conditions were clearly inadequate. The Cape Cod facility was finally shut down, but only when NMFS found it to be "unsatisfactory and inoperable". Clearly NMFS has the expertise to establish adequate standards for all species of marine mammals held in captivity, as demonstrated in its recently published proposed regulations to govern special exception permits, and should have primary responsibility for these animals.

Most importantly, however, the MMPA clearly grants NMFS statutory authority over all marine mammals, regardless of the environment they inhabit. As NMFS has maintained, in its proposed regulations and in a recent lawsuit brought against NMFS by the Mirage Hotel in Las Vegas, captivity is a form of "take". It results in animals being placed in surroundings completely alien to their natural environment and being maintained in these artificial surroundings on a continuing basis. NMFS should therefore have jurisdiction over those on-going takes. Under no circumstances should APHIS, an agency of the U.S. Department of Agriculture, be given primary authority over any animals protected by the MMPA.

2. The MMPA should be amended to prohibit the capture from the wild of marine mammals for public display, as well as their import and export.

The public display industry has been extolling the successes of its captive breeding programs for marine mammals. Indeed, most pinnipeds currently in captivity were

captive-bred and there are probably sufficient numbers and genetic diversity available among the captive population to sustain itself without supplementing with wild-caught individuals. Bottlenose dolphins (*Tursiops* spp.) also are breeding consistently in captivity and are close to self-sustaining. It is important to note that none of the species concerned are endangered, so their captive-breeding programs cannot be considered necessary for conservation. In further support of this point, facilities engaged in captive breeding are not actively pursuing programs designed to rehabilitate and release into the wild any progeny produced. We therefore question whether these programs benefit the species involved or promote the intent of the MMPA, but regardless, we maintain that, by the industry's own admission, wild captures of individuals from these groups are no longer necessary for public display or captive breeding.

In addition, as earlier discussed, beached and stranded animals that cannot be released provide a source for augmentation or replacement of captive collections of marine mammals. Although frequently permanently disabled (e.g. blind, deaf, or missing appendages), these animals can be used to educate the public just as can healthy individuals, although their entertainment value may be diminished. As, according to the industry, entertainment is not the primary goal of public display, this should not be an issue. In short, public display can continue as a tool for education and conservation, using captive-bred and unreleasable stranded animals, without capturing healthy individuals from intact social groups in the wild. States such as Florida recognize this, as indicated by the passage of a resolution asking Congress to ban captures.

The industry maintains that because of small captive populations for all other cetacean species (again, most of which are not endangered), wild captures will continue to be necessary into the foreseeable future to maintain genetic diversity among the captive population. This assertion does not support the intent of the MMPA or common sense. If a species is not endangered and a self-sustaining captive breeding program is not possible without wild-caught supplementation, then it is questionable that such a species should even be maintained in captivity. Certainly wild captures in such a case are not necessary for conservation and continuing to allow them is like allowing someone to try to fill a bucket that obviously has a hole in it.

For example, the four small whale species currently held in captivity include the killer whale, the false killer whale, the beluga, and the pilot whale. These species suffer higher mortality rates, reduced life spans, and lower birth rates in captivity than do populations in the wild. Captive killer whales experience a mortality rate more than 3 times as high as that observed in a well-documented wild population (7% annual mortality vs. 2% annual mortality). In 30 years of holding these four species in captivity in the U.S., less than 20 calves have survived past the first few months and are still alive today. It should be clear that individuals of these species cannot handle the transition from the wild to captivity.

We now have a high level of understanding of the social structures and behaviors of marine mammal species in the wild. We know that most exhibit long-term familial bonds and in general are socially complex, long-lived, mentally sophisticated creatures. Cetacean species may travel up to 50 to 100 miles a day, dive several hundred feet deep, and spend only 20% of their time at the surface of the water. The transition from their natural environment to captivity in a small concrete tank can only be unimaginably traumatic. A symbol of all that is wrong with removing these animals from their natural environment is the collapsed dorsal fin seen in most captive killer whales, probably the result of spending more than half of their time at the surface of their tanks. This phenomenon is observed in less than 1% of wild killer whales.

The capture process itself, where animals are rounded up, netted or lassoed, or driven into shallow water, snatched from family and removed from the water, is incredibly cruel and stressful. Recent revelations concerning the terribly inhumane drive fishery capture method underscore the problem with allowing the removal from the wild of these animals. U.S. interests have been involved in subsidizing the Japanese drive fisheries, where hundreds of dolphins are killed to provide a handful of individuals for sale to marine parks and aquaria. Only prohibition of this cruel practice will guarantee that such abuses will end.

The public has received the message of conservation and habitat protection. The message will be reinforced through various media, such as wildlife videos and interactive displays, as well as eco-tourism, shore-based observations, and marine parks that display captive-bred or stranded animals. The public, as demonstrated by recent polls in which as many as 70% of respondents were opposed to the capture of wild dolphins, has realized that snatching these magnificent creatures from their natural home, to exist in confinement in circumstances wholly alien to their experience, is no longer necessary for education and certainly not for entertainment and in itself does not support a conservation message.

Concerning import and export, we advocate the outright prohibition of these practices. Imports may encourage foreign facilities to become an indirect source of wild-caught animals for U.S. facilities unwilling to weather the increasing controversy over wild captures. Exports increase the potential that animals will find themselves in sub-standard situations abroad. Certainly it is unlikely that NMFS and APHIS have been or will be able to adequately inspect and certify foreign facilities before granting them U.S. permits, given real-world personnel and budgetary constraints.

Representative Mike Bilirakis of Florida has introduced H.R. 656, which addresses the issue of export of captive marine mammals. He and the co-sponsors of 656 have recognized the threat to the well-being of those animals that are sent out of this country

and we thank them for their efforts to rectify this situation. H.R. 656 also addresses issues, such as a rigorous tracking system for individual animals, that are covered in the proposed regulations published by NMFS, which merely emphasizes that NMFS should have primary authority over captive marine mammals.

3. The MMPA should be amended to prohibit all forms of direct contact between humans (other than animal caretakers) and marine mammals.

We believe that petting pools, feeding programs, and swim-with-the-dolphin programs do not constitute legitimate forms of "public display" and as such, these interactive programs should be specifically prohibited. Such programs pose unacceptable risks to the safety and health of both the humans and marine mammals involved. Independent studies of swim-with programs confirm these conclusions. Indeed, there have been a disturbing number of reports of aggression and sexual behavior between dolphins and humans in swim-with programs. Increasing numbers of injuries to participants have resulted in legal actions taken against program operators and have opened the door to potential litigation against NMFS. Regardless of the number of years in captivity or even being captive-bred, these are wild, not domestic, animals, who are large, powerful, and possess sharp teeth, and are known to exhibit aggression toward each other under various naturally-occurring circumstances. The potential for tragedy in forced interactions with humans is obvious. Interactive programs involving marine mammals contribute no additional educational benefits to standard display and in fact constitute pure entertainment, which is not the intent of the MMPA.

4. The MMPA should be amended to prohibit the intentional feeding of marine mammals in the wild.

We strongly supported the ruling by NMFS that feeding marine mammals in the wild constitutes a "take" under the MMPA and fully endorsed efforts by NMFS to act in the best interests of the animals by issuing regulations banning this disruptive practice. Feeding wild animals to artificially create opportunities to observe them in the wild fosters dependency on humans. In the case of marine mammals, it threatens to habituate them to the approach of boats, which could result in increased injury or harassment, especially if the animals begin aggressively approaching boats for handouts. Intentional feeding may disrupt natural foraging patterns and social interactions, and may introduce exotic pathogens or parasites, depending on the handling history of the food source. The most prudent course would be to avoid exposing wild marine mammals to these potential hazards, especially when it is unnecessary. The public can easily observe wild dolphins and manatees, the two species currently at risk, without luring them with handouts.

5. The MMPA should require that the disposition of beached/stranded marine mammals be strictly regulated.

The MMPA is unclear about the determination of the releasability of stranded or injured animals. In fact, this ambiguity has allowed animals to be held captive for years in substandard situations by facilities lacking permits or the ability to meet permitting requirements. We believe that the process by which facilities receive animals and determine their eventual fate must be made more stringent. Under no circumstances should a facility be issued a permit to retain a stranded animal before that animal has been evaluated as to its releasability. The evaluation itself should be carefully monitored by federal agencies, especially when the species or stock involved is endangered, threatened, or depleted. We endorse the provisions for beached/stranded animals in the proposed regulations published by NMFS.

6. The MMPA should be amended to prohibit invasive and lethal research on marine mammals unless it will directly benefit the species in the wild.

We recognize that, despite excellent efforts, many stranded animals that are treated at public display facilities do unfortunately die. The bodies of these animals may provide data critical to scientific advancement and the study of their tissues can provide valuable information. However, we believe that there are very few circumstances that justify the killing of healthy marine mammals in scientific studies. Invasive experiments are also justified only under a limited set of circumstances. In both cases, we believe that such research should be undertaken only when its results will directly benefit the species being studied and no alternative, non-invasive methods exist. This may include basic research that increases our understanding of the physiology and/or ecology of a species. However, lethal and invasive research is extremely disruptive to wild populations and can result in the unintentional deaths of both the animals being handled and in animals involved in the social disruption, such as seal pups separated from their mothers when researchers enter a rookery area. NMFS' proposed regulations contain a definition of legitimate scientific research that is too broad and should be amended to limit its scope and the potential for abuse. We again direct the Committee to the Bilirakis bill (H.R. 656), which contains language specifically addressing this issue, and which we fully endorse.

CONCLUSION

Because of their aquatic environment, complex social structures, and intelligence, marine mammals require special consideration in captivity and when interacting with humans. The MMPA was designed to safeguard these special considerations. We believe that the

above amendments will ensure that the MMPA functions as it was intended regarding captive marine mammals and marine mammals involved in scientific research. We believe that these amendments will define a new and humane relationship to these animals for the future. Again, thank you for the opportunity to express our views. We are prepared to assist the Committee in any way on these issues.

Statement by Peter L. Tyack for a Hearing on the Reauthorization of the Marine Mammal Protection Act conducted by the Subcommittee on Environment and Natural Resources of the Committee on Merchant Marine and Fisheries of the U.S. House of Representatives

Comments on permits for scientific research

I am a biologist on the scientific staff at the Woods Hole Oceanographic Institution, a private non-profit institution for research and education in oceanography. For the past two decades, I have studied the acoustic communication and social behavior of whales and dolphins in the wild. Since these animals are regulated by the National Marine Fisheries Service, I will comment more upon this agency than the Fish and Wildlife Service, which regulates several other species. Conservation biology is not my profession, but I hope that I can contribute an independent scientific perspective. I will argue that regulatory effort should be proportionate to risk to animal populations, and that ecosystem-oriented management must be pursued more vigorously.

Marine mammal populations in U.S. waters are primarily threatened by unintentional effects of human activities. Overfishing may deplete marine mammal prey enough to reduce the carrying capacity of the environment. Chemical and noise pollution degrade the quality of marine mammal habitats. Ships and fishing gear kill or injure marine mammals by accident. These are serious policy issues, and we should not be distracted elsewhere. However, as the 1984/85 Annual Report on the Marine Mammal Protection Act (MMPA) puts it: "One of the most extensive administrative programs in the National Marine Fisheries Service is the permit system that authorizes the taking of marine mammals for scientific research and public display." This regulatory focus on scientific research and public display is completely out of balance with the relative risk these activities pose to marine mammals. It also penalizes the very activities that may benefit marine mammals.

Let me give an example from the most endangered baleen whale -- the northern right whale. Most of the 300 right whales left in the western North Atlantic carry scars from vessel collision or entanglement with fishing gear, and more adults die from vessel collision and net entanglement than any other known causes. Even though ships predictably kill these whales, Federal actions locate shipping channels in the middle of dense concentrations of feeding whales. Under current regulations, there are no preventive controls on ships or fishing gear most likely to kill or injure the last remaining right whales. In contrast, more and more controls are being placed on the scientists who document these problems. A group of biologists on Cape Cod risk their own lives to save entangled whales. Since they approach

whales closely, the National Marine Fisheries Service required them to obtain permits to "take" these whales by harassment. The National Marine Fisheries Service took a year to issue them a permit. If the scientists had not continued to rescue whales illegally during this year, whales might have died from a lethal combination of lax regulation of fisheries coupled with over-regulation of the rescues. A Woods Hole permit application to track habitat use by right whales was held up for over two and a half years, so long that it had to be retracted. By ignoring the real problem and hampering its solution, the current implementation of the MMPA is doing more harm than good for right whales.

How did this policy go so wrong? The MMPA of 1972 banned any taking or importing of marine mammals, with permits to be issued only for public display or scientific research. For commercial fisheries, "take" is usually construed as killing or injuring. However, the definition of "take" in the MMPA lumps together kills with harassment. Harassment is poorly understood, but when a scientist asks for a research permit, "take" has been defined to include minor behavioral reactions of negligible impact either to individual animals or to populations. The National Marine Fisheries Service devotes a significant fraction of its regulatory effort tracking hundreds of research permits, treating people who photograph an animal with similar rules as those who shoot one. This leads to two problems. First, most projects are delayed for most of a year, ruling out unpredictable opportunities, and discouraging many promising students and established scientists from working with marine mammals. The Scripps Institution of Oceanography has written a letter discouraging potential students from marine mammal research because of excessive government regulation. Second, when the National Marine Fisheries Service allocates scarce resources on research and display, it ignores many more serious problems such as the vessel collisions with right whales.

Another example may illuminate the problems of this double standard. Extensive research shows that whales are disturbed by loud ships when they are many miles away. These results suggest that, under current regulations, most ships "take" thousands of marine mammals a year by harassment. These "takes" are completely predictable in many areas of high marine mammal density. If commercial ships operated under the same rules as research, they could seldom leave the harbor. The inconsistencies of this policy do no good for marine mammals and are vulnerable to challenge in court.

There is a critical need to redefine "take" in the MMPA in a way that focuses effort based upon magnitude of risk to animal populations. I support a tiered definition separating takes involving death or injury from takes which might harm an animal or population and those which are not likely to cause harm. Given the past regulatory history, it may be important to require regulators to control the most dangerous takes before

committing resources to insignificant ones.

The purpose of permits for scientific research under the MMPA was to allow scientific activities that would otherwise be prohibited. The current permit process for scientific research is not inappropriate for the rare requests for lethal or injurious research. However, I do not support requiring permits for research activities that have negligible impact or that are not regulated for other groups. The MMPA should be amended to allow a general authorization for these specific research activities. There is no reason this should not include notification requirements, but requirements for extensive advance warning would restrict access to the unpredictable research opportunities that are such an important part of marine mammal science.

It is less clear how to regulate research activities with an unknown potential to harm or harass animals. The National Marine Fisheries Service has devoted more effort to this gray area than to many nonresearch activities posing much greater risks to marine mammal populations, but their newly proposed definitions for harassment remain deeply flawed. The failure of the National Marine Fisheries Service to regulate harassment contrasts with the relative success of Institutional Animal Care and Use Committees to regulate the complex issues of potential harassment or pain to individual animals under the Animal Welfare Act. The Animal Welfare Act is specifically designed to protect individual animals, just as the MMPA is designed to protect populations. I would suggest that issues of potential harassment or pain to individual marine mammals in the course of research be regulated by such committees, and that regulation under the MMPA concentrate on risk to populations. This must involve regular notification to the appropriate Federal agency of all research potentially harassing or harming individual marine mammals, and Federal notification to all Care and Use Committees of special requirements for depleted populations or critical habitats.

As a scientist, I must point out that research methods involving physical contact with an animal may involve less risk than other methods. For example, if one needed to determine the home range of an animal for a whole season, attaching a small tag in one approach might be preferable to repeated close approaches for photography. This issue is of particular importance because biopsy sampling is well documented to pose negligible risks to large whales and provides tissue critically needed for conservation issues such as stock identification and contaminant analysis. The wording of the MMPA should emphasize magnitude of risk and to determine lists of which research activities belong in which risk category based upon the best scientific evidence. This might include specific approved protocols. Some method to expedite the transfer of tissue whose collection involved minimal risk is also needed. Difficulties in shipping tiny samples across international borders create a major obstacle to

identification of marine mammal stocks.

I must mention another area where a tiered definition of take must be implemented. The only exemptions from the prohibition on taking marine mammals that are available to activities other than commercial fishing, marine mammal research, and public display, are the small take exemption of section 101(a)(5) and the one year economic hardship exemption of section 101(c). If the same definition for taking that is currently applied to research were applied across the board, few sea-faring activities would be able to conduct business. For example, the only mechanism available under the MMPA to allow whale responses to ship noise would be for the Secretary to issue a one year exemption for economic hardship. Even if these noise responses were shown to have negligible impact, they would not be eligible for a small take exemption because so many whales would be expected to respond to the noise of each ship.

The existing language for small take exemptions may be reasonable for lethal takes, although the regulatory process is so arcane and time consuming that only eight petitions have been filed. If NMFS is going to start enforcing the prohibition against taking marine mammals to industries such as shipping or underwater demolition, some more streamlined regulatory mechanism needs to be developed. A better solution would be to include all activities in the allocation of potential biological removals that were originally designed for commercial fisheries. I would suggest that takes such as minor disturbance responses which involve minimal risk to either individuals or populations should not require authorization. I suggest deleting references to small numbers of marine mammals for takes that involve negligible risk. Some middle ground must be found to regulate takes that might conceivably harm marine mammals. The policy should emphasize that the critical issue is risk to populations and should involve strong incentives to determine the level of risk.

There is an important larger issue here. The impact of harassment and disturbance on populations depends upon cumulative impacts which are a form of habitat degradation. This means they are better regulated as habitat management problems than by attempting to regulate individual acts. While harassment is difficult to define in the abstract, it is easier to rank the significance of prey depletion, incidental take, contamination, or harassment for a specific population in a particular habitat.

The single most important change in policy most likely to protect marine mammals is to develop better stock assessments to target populations at risk. The MMPA has required a continuing review of the status of marine mammal populations since 1972. Twenty years later, estimates are available for

fewer than half of the whale and dolphin populations. Few populations are monitored closely enough to detect declines before they cause jeopardy. There is a clear need for a renewed commitment for long term population monitoring and stock assessment in the MMPA.

Once depleted populations are identified, the mechanism for habitat management in the current MMPA is conservation or recovery plans. Of the 9 great whale species declared endangered in 1970, only 2 have conservation or recovery plans. While these two plans are fine, they are a drop in the bucket. Furthermore, while the right whale recovery plan recommends ways to reduce the threats posed by vessel collision and fishing gear, these recommendations are not enforced. Marine mammal protection will be better served by redirecting resources from extensive permitting of trivial research takes to stock assessment and conservation plans with some enforcement power. The MMPA must be updated from regulating the intentional takes of the whaling era to an era where a broad array of unintentional impacts threaten marine mammals and the ecosystems upon which they depend.

Testimony of Caleb Pungowiyi
before the House Merchant Marine and Fisheries Committee
Concerning the Marine Mammal Protection Act
February 10, 1994

Good morning. My name is Caleb Pungowiyi, President of the Inuit Circumpolar Conference and a member of the Indigenous People's Council for Marine Mammals. I appreciate the opportunity to present my testimony on behalf of Native subsistence users of marine mammals in Alaska, and also in Greenland, Canada, and Russia.

The Indigenous People's Council for Marine Mammals (IPCMM) is composed of Native commissions and organizations working to conserve and protect marine mammal populations and Native uses of those mammals for subsistence and the making of handicrafts and clothing. The Council's members are:

Alaska Eskimo Whaling Commission
Alaska & Inuvaluit Beluga Whale Committee
Alaska Sea Otter Commission
Arctic Marine Resources Commission
Association of Village Council Presidents
Bristol Bay Native Association
Eskimo Walrus Commission
Inuit Circumpolar Conference
North Slope Borough Department of Wildlife Management
Pribilof Aleut Fur Seal Commission
Southeast Alaska Native Subsistence Commission

The Council is authorized to speak for the Alaska Native community, including the Alaska Federation of Natives, on marine mammal issues and reauthorization of the Marine Mammal Protection Act.

I sit on the Council in my capacity as President of the Inuit Circumpolar Conference (ICC). The ICC is an international organization that represents approximately 115,000 Inuit living in the Arctic regions of Alaska, Greenland, Canada, and Chukotka region in the Commonwealth of Independent States. The principal goals of the ICC are:

1. to strengthen unity among Inuit of the region;

2. to promote Inuit rights and interests on an international level;

3. to seek full and active partnership in the political, economic, and social development of circumpolar regions in order to promote greater self-sufficiency among Inuit and to ensure the growth of their culture; and

4. to develop and encourage long-term policies which safeguard the Arctic environment.

Summary

Alaska Natives have relied on marine mammals for their food, handicrafts, and culture for centuries. They have successfully managed their use of marine mammals, assuring that no more is taken than is needed. They have created marine mammal commissions to protect these uses, and to formalize Native management.

The Native take exemption in section 101(b) of the MMPA recognizes these factors by allowing Native take to be regulated only by Alaska Natives unless a species is found to be depleted. The exemption has worked well over the past 22 years, and should not be amended. There are, however, at least three ways in which the MMPA can be improved as it pertains to Alaska Native uses of marine mammals:

1. The work of Native communities and commissions has been increasingly constrained by the lack of funding. I recommend that Congress authorize an appropriation directly to the Native community so that it may extend and expand its work at data collection, self-regulation, and development of comanagement mechanisms.

2. The potential threats to marine mammals from pollution of their ecosystem is of great concern. Additional funding is needed to study these threats -- with full and equal involvement of Alaska Natives -- and mechanisms should be added to protect marine mammal habitat.

3. At present, Alaska Natives and their relatives in Russia, Canada, and Greenland are not allowed to import marine mammal products that they own or that they received or are bringing as gifts. This simply makes no sense; the MMPA should be amended to allow importation of personal items and gifts.

Detailed testimony

I will divide my testimony into five parts: the importance of uses of marine mammals to Native nutrition and culture; the effective steps being taken by the Native community to ensure conservation of marine mammal species; the value of a comanagement approach to management of marine mammals in Alaska; the effects of pollution on marine mammals and the Alaska Natives who rely on them for food; and suggestions for amendments to strengthen the MMPA, especially with respect to issues that would affect Native subsistence uses.

The importance of marine mammals to Alaska Natives

As the Congress has consistently recognized over the past 22 years, the use of marine mammals by Alaska Natives (and those in Canada, Greenland, and Russia) is an integral part of their way of life. Marine mammals of all kinds, notably including walrus, polar

bear, sea otter, beluga whales, bowhead whales, fur seals, sea lions, and a variety of species of seals, are a key source of food for Alaska Natives living throughout coastal Alaska. Marine mammals supply a preferred fresh food for Alaska Natives throughout the year, as well a source of barter and trade with inland Natives in exchange for land mammals that may not be available to those who dwell on the coast. Marine mammals also figure prominently in Native stories, art, traditions, and cultural activities.

Alaska Natives make a wide variety of handicrafts and clothing from the marine mammals they harvest. They sew parkas, hats, gloves, and footgear to keep themselves warm. They make carvings and decorations for their homes and for gifts to their friends and relatives. They barter these items for other items through traditional trading networks throughout Alaska. And they sell what they make to Natives and non-Natives alike.

The sale of handicrafts made of marine mammal by-products has become a crucial source of income in many remote Native villages. Jobs are scarce there, and many have limited ways to make money other than government assistance and the occasional seasonal job. The limited cash that carvers and sewers can make from their hand-made clothing and handicrafts therefore is vital in providing at least some cash in the villages to sustain the subsistence hunting and fishing way of life.

I want to emphasize two things in this respect. First, in keeping with the conservation ethic upon which all Native cultures are fundamentally based, Alaska Natives do not take marine mammals just to make handicrafts from the ivory and skin. Rather, they take marine mammals for subsistence purposes and for the use of the non-edible parts for clothing and handicrafts. This leads to my second point: the production of handicrafts is <u>not</u> commercial activity, but a continuation and adaptation to a market economy of an ancient Native tradition of making and then bartering handicrafts and clothing for other items that Natives need.

As this short description of the use and importance of marine mammals makes clear, the taking and use of marine mammals is a fundamental part of Native culture, whether it be Yupik, Inupiaq, Indian or Aleut. It is so fundamental that Alaska Natives are committed to doing whatever it takes to preserve and protect their rights to harvest these animals according to the cultural ways.

Alaska Natives are not the only ones with a long-standing tradition of reliance on marine mammals. Their relatives in Greenland, Canada and Russia are equally dependent on these resources, and rely on them in much the same manner: for food and clothing, and as a source of income. I urge the Committee to keep this important point in mind as it evaluates how best to continue to protect uses of marine mammals by <u>all</u> indigenous peoples, regardless of where they live.

Self-regulation of marine mammals by Native peoples

The use by Alaska Natives of marine mammals for literally thousands of years has made Native peoples wise stewards of marine mammal populations. Native cultures throughout Alaska and other countries have developed a comprehensive set of rules, largely unwritten, governing the use of marine mammals. These rules are premised on conservation, the avoidance of waste, and respect for the fish and animals that are used. For the most part, they have worked quite well in regulating Native uses. Unfortunately, most of what is heard or known about Native take are those few who behave wastefully.

Because success in hunting requires a good understanding of the behavior of marine mammals species, and of the environment in which they operate, Alaska Natives have also developed a comprehensive body of knowledge about these animals and their habitat. That knowledge is holistic in nature, looking at particular species in the context of their inter-relationships with other species and the environment in which they all live. It also is based primarily on experience and the teachings of elders. Relatively little comes from books or university courses.

Taken together, these rules and the indigenous knowledge on which they are based have protected all of the species on which Natives rely for subsistence purposes. No species of marine mammals has been placed in a depleted, threatened or endangered status by Native take. Indeed, as the following table demonstrates, Native take of marine mammals represents only a very small percentage of their overall populations:

Species	Estimated Population	Average Annual Native Harvest	Percent
Walrus	200-230,000	3,000	1.3-1.5
Sea otter	150-300,000	1,100 (1993)	0.7
Polar bear	5,000 (low)	80	1.6
Sea lions	80-85,000	548	0.7
Beluga	20,000 (Northwest)	350	1.8
Bowhead	7-10,000	47	0.7
Bearded seal	350,000	1,500	0.4
Ringed seal	1,250,000	4,500	0.4
Spotted seal	225,000	2,800	1.2
Harbor seal	Not available	2,867	N/A

It might be noted in this respect that Native take often pales in comparison to other sources of take. For example, a study prepared for NOAA found that 85% of the take of sea lions from 1956 to 1990 came from sources other than Natives, principally commercial fisheries. Trites & Larkin, "The Status of Steller Sea Lion Populations and the Development of Fisheries in the Gulf of Alaska and Aleutian Islands," (July 1992), p.49.

The lack of any negative impact on marine mammal populations by Native take should come as no surprise. The conservation ethic of Native culture is deeply engrained, and taught to Native children from the time that they are able to understand it. And aside from the importance of learning these rules as a means of continuing traditional Native practices, it obviously is in the interests of Native peoples to ensure that they do not take too many animals, for they want the populations to remain healthy so that they can serve as a continuing source of food and culture.

Alaska Natives believe strongly that Native traditions, practices, and culturally-taught rules are sufficient to protect and conserve all marine mammal species used by Native peoples. But Alaska Natives also understand that they live in a very different setting than that in existence prior to western contact. Western culture has made substantial and dramatic inroads on traditional Native beliefs and practices.

Native uses also must now contend with federal and state law, and the agencies which implement and enforce those laws, as well as with the expectations of interest groups, especially the animal rights groups who, to put it charitably, are very concerned with and often opposed to, Native uses of marine mammals. While they profess an understanding of Native cultural institutions, many of these agencies and organizations demand from Alaska Natives that they show in concrete terms how Alaska Natives in fact work to conserve marine mammal species.

Faced with the dual demands of protecting and preserving Native cultural practices and of satisfying the desires of others to show concrete examples of Native self-regulation, Alaska Natives have formed a number of marine mammal commissions whose purpose is to provide institutional mechanisms for the protection of both Native culture and marine mammal species. I would like to give you a brief description of the activities of the commissions, and of some efforts under way in some Native villages. (I have attached to my testimony pertinent materials regarding these activities.)

Alaska Eskimo Whaling Commission.

The organization of the AEWC began in the fall of 1977, after the International Whaling Commission imposed a zero bowhead whale harvest quota on the Eskimo people of northern Alaska. The action was taken without consultation with the people who had hunted the animal for centuries, and despite the universal recognition that the whale's depleted status was not the result of Native subsistence harvests. Though they could not have been faced with a more serious threat to the continued existence of their traditional culture, the Eskimo people did not act rashly, but quickly recognized the need to organize. They formed a Commission which included representatives from all of the harvesting communities, and overcame great odds to become an effective and respected voice in the management of the bowhead whale. Through a memorandum of agreement with NOAA which defines and shares responsibilities and duties regarding research, regulation, and

enforcement, the AEWC has addressed management questions ranging from harvest levels, equipment and safety, to humane and non-wasteful hunting practices. The Commission has acted decisively to discipline the rare hunter who does not comply with all of the harvest regulations it has promulgated with the approval of NOAA. Today, it is engaged in a program to continue its extensive educational and weapons development projects aimed at increasing the efficiency, safety, and humaneness of whale harvests under the IWC quota.

Alaska and Inuvialuit Beluga Whale Committee.

A recent article in Arctic, June 1993, pp. 134-37, summarizes well the work of this important commission:

> The Alaska and Inuvialuit Beluga Whale Committee was formed in 1988 to facilitate and promote the wise conservation, management and utilization of beluga whales in Alaska and the western Canadian arctic. The membership of the Committee consists of representatives from beluga whale hunting regions and communities in Alaska and the Mackenzie River Delta in Canada, U.S., federal, state and local government agencies, and others, such as researchers and technical advisors. Only representatives from beluga whale hunting communities vote on matters related to hunting, while the committee as a whole votes on other issues. Harvest monitoring programs are planned and coordinated at the spring meetings, implemented during the whaling season by hunters and others and reported upon during the fall meeting. To date, the AIBWC has: 1) established beluga whale research priorities; 2) coordinated or assisted with the collection of samples for genetic, contaminant and basic biological studies; 3) provided funding for DNR studies; 4) commented on federal actions (e.g., relating to oil and gas exploration activity) with the potential to affect beluga whales, beluga whale habitat or beluga hunting; 5) collected the most complete harvest data ever available for Alaska; 6) produced a newsletter highlighting important marine mammal issues for coastal residents of Alaska; and 7) sponsored the attendance of committee members at meetings of the International Whaling Commission. The AIBWC recently ratified its draft Alaska beluga whale management plan, a counterpart to the existing plan for beluga whale management in the western Canadian Arctic, and has initiated discussion of a joint Inupiat-Inuvialuit plan for management of the shared Beaufort sea beluga whale stock.

Alaska Sea Otter Commission.

The ASOC was formed in 1988 to provide a united voice to promote Native participation in resource policies affecting sea otters and their uses. Since then, the ASOC has begun developing locally-based sea otter management plans. The Commission is comprised of six commissioners representing the six regions of Alaska in which sea otters are harvested by Alaska Natives -- these

span from southeast Alaska to Bristol Bay in southwestern Alaska, including Kodiak Island, Prince William Sound and the Alaska Peninsula and the Aleutian Islands. On February 1, 1994, the Commission entered into a Memorandum of Agreement with the Fish and Wildlife Service and the Alaska Department of Fish and Game. The MOA sets out the respective responsibilities of the three organizations concerning the management of sea otters. The Commission is currently in the process of developing locally-based regional management plans for each of the six regions represented by the Commission. In January, 1993, the ASOC hired a marine mammal biologist to develop the regional management plans in consultation with tribal leaders, sea otter hunters, and skin sewers. The goal of the management plans is to develop harvest guidelines and to assure biologically and ecologically sound plans that conform to traditional Native regulatory practices. A Scientific Advisory Council has been convened by the ASOC to assist with the plans. At this point, the research necessary to draft plans for two regions has been completed, and plans for the four remaining regions will be completed by December, 1995. In addition to developing the locally-based, regional sea otter management plans, the ASOC continues to work towards informing Alaska Natives about existing federal laws regarding sea otters, and to assure there is no wasteful take of sea otters.

Eskimo Walrus Commission.

The Eskimo Walrus Commission was formed in 1978 by villages throughout western, northwestern and northern Alaska for a variety of purposes related to protection of subsistence uses of walrus by Alaska Natives:

1. to encourage self-regulation of walrus hunting and management of walrus by Alaska Natives;

2. to provide education and information to the public;

3. to assure the wise utilization of all parts of the walrus, including the encouragement of better food preservation and improved means of harvest;

4. to represent marine mammal hunting communities in reviewing and commenting on governmental and other actions which might affect marine mammals;

5. to involve users in the decision-making process and in scientific research programs; and

6. to encourage the federal government to cooperate with other nations in studies, enforcement, and other involvements in the well-being of marine mammals.

The EWC has 19 commissioners who act on behalf of the walrus-hunting communities. In 1980, the Commission assisted in the creation of the Pacific Walrus Technical Committee, which is

composed of representatives of the Commission, Fish and Wildlife Service and Alaska Department of Fish and Game to discuss walrus related issues, disseminate information among the three agencies, and make recommendations to the EWC. Later, in 1987, EWC, FWS, and ADFG entered into a formal Memorandum of Agreement for the joint management of walrus; under that MOA, the three agencies are proceeding on conservation/management planning for walrus. The EWC also has been quite active in promoting non-wasteful uses of walrus; in pursuit of this goal, it has cooperated with FWS in the prosecution of the few hunters who behave wastefully.

Polar bears.

While there is no formal polar bear commission at this time, Alaska Natives have expended considerable efforts in polar bear management. Perhaps the most significant of these is the signing of a cooperative agreement between the North Slope Borough and the Inuvaluit Game Council in Canada regarding the management and harvest of the Beaufort Sea polar bear population. That agreement sets limitations on the harvest of polar bears by Alaska and Canadian Natives, and serves as a vehicle for comprehensive management and protection of that population; it has been very successful in all respects. Alaska Natives who use the Chukchi Sea polar bear population are now in the process of emulating that agreement by working with Russian Natives to develop a joint agreement for the Chukchi Sea population. The intent here is to arrive at both a Native-only agreement, and to work with the U.S. and Russian governments to develop an international, four party agreement respecting the use and management of the Chukchi Sea stock. The Native community is also monitoring FWS' proposed polar bear habitat protection policy. And it is in the process of evaluating whether and how best to develop a formal polar bear commission.

Village initiatives.

Many villages in Alaska have come to realize the value of formally promulgated ordinances regulating the take of fish and wildlife for subsistence purposes. Several of these ordinances pertain to marine mammal hunting. For example, the village of Gambell on St. Lawrence Island has a comprehensive marine mammal hunting ordinance, which governs the take of marine mammals by village residents, sets up a mechanism for monitoring take, and contains specific enforcement policies and proceedings. Three other villages in northern Norton Sound are now working cooperatively on a joint regulatory approach for the take of beluga whales, by which each village will promulgate ordinances governing their own members and enter into a cooperative agreement to recognize those ordinances with respect to uses of beluga whales by the members of the other villages. Other villages are working on regulatory approaches of their own, a trend that I believe will increase significantly over the next few years, especially if adequate funding can be found.

The value of the Native commissions.

The formation and work of the commissions discussed above is meant to satisfy several goals. First, the commissions operate to provide information to and advocacy on behalf of Native marine mammal users. This provides a formal means for Alaska Natives to pass on their beliefs to future generations, and to help remote villagers understand the myriad of rules and regulations with which they must contend.

Second, the commissions work to develop regulatory structures with the villages, thereby formal structures to supplement (not replace) existing practices to protect marine mammals species. These regulatory structures also provide the concrete mechanisms sought by government agencies and outside interests, demonstrating in a more western context precisely how Native rules and regulations are applied and enforced in the villages.

Finally, the commissions provide a vehicle for comanagement of marine mammal species between the government agencies on the one hand and Native users on the other hand. "Comanagement" has become an important concept in Alaska, referring as it does to the actual sharing of power and responsibility for marine mammal management in a way that best protects the interests of the Native peoples, the government, and the marine mammal species themselves. It is so important that I would like to discuss its value in greater detail.

Comanagement

The idea of shared decision-making over marine mammal research, regulation, and enforcement has taken on considerable urgency in recent years, as Alaska Natives have increasingly had to deal with federal and state hunting regulations that often are inconsistent with Native customs and traditions, to the point that those regulations may require hunters and fishers actually to violate their own cultural rules. The custom and tradition of Alaska Natives is characterized by two key principles. First, as a general rule, Native subsistence users take only fish and game as needed, and they take it when it is available. Second, the take is shared with their family and neighbors. The standard management tools of seasons and individual bag limits generally are inconsistent with these customs. For example, a fall hunting season will severely restrict the custom and need to obtain fresh meat during the winter; and an individual bag limit of one animal per hunter hardly will allow that hunter to provide for his family, his sister's family, and his parents.

Another standard management tool is the use of methods and means restrictions, generally for the purpose of conservation (such as prohibitions on fish traps), enforcement (sealing and tagging requirements), and some notion of fairness (not shooting from a snowmachine). While unintentional, some of these restrictions place Native hunters in a difficult position, for they may require them to violate their cultural rules. For example, with some

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exceptions, state and federal regulations require that the skull of a brown bear be brought back to the village to be sealed and tagged -- yet the custom in many Eskimo and Indian villages is that the skull is to be left in the field as a sign of respect for the bear. Other restrictions impair the efficiency of Native hunters to no apparent purpose. Efficiency is a key element of subsistence hunting. The rule prohibiting a hunter from shooting a caribou from a snowmachine makes little sense to the hunter in deep snow who wants to use the handlebar as a gun rest.

The Canadian government has faced similar issues with respect to Native take in northern Canada. The Canadians' response has been to create mechanisms that incorporate traditional knowledge and Native ways into the regulation-making process, with Natives participating as decision-makers, rather than as interest groups commenting on government proposals. My own observations confirm that the Canadian's co-management approach generally has been quite successful there.

Co-management has also been tried, to a lesser degree, here in the United States. Two notable examples are the work done with the Alaska Eskimo Whaling Commission and with migratory bird hunters on the Yukon-Kuskokwim Delta. The federal government and the AEWC have entered into an agreement which basically provides that the AEWC will have the primary responsibility for regulating whale hunting and for enforcing the regulations -- the government's role is to step in and enforce the law if someone violates the AEWC's enforcement orders. The Yukon-Kuskokwim Delta Goose Management Plan is a landmark agreement, by which the federal government agreed not to enforce the prohibition on spring and summer hunting of migratory birds, if Native hunters agreed not to hunt certain species of birds. The Plan contains a variety of provisions setting out how enforcement will be carried out, including joint efforts at implementation and notification to the villages of possible violations.

These approaches have been very successful, but they unfortunately are exceptions to the general approach in Alaska. Alaska Natives have been told that the phrase "co-management" is not acceptable to federal officials in Alaska, and that the term "cooperative management" is to be used instead. The Native experience is that this really means: "We manage and you cooperate." That is, the Native role largely is confined to one of consultation with federal agencies, with little actual authority being recognized or granted to Native villages or organizations. And when Natives attempt to present their traditional knowledge to federal agencies, that information usually is dismissed as "anecdotal" and hence not as reliable as that provided by university-trained scientists.

The Alaska Native community believes that the federal government needs to be more receptive to the validity of traditional knowledge, and the value of co-management as a means of assuring better information about and management of fish and wildlife resources in Alaska. Meaningful Native involvement in

both research and regulation development is vital if the regulations are to make sense in a Native context, and if they are to be effective in assuring conservation of the resources. This goes beyond consultation to an actual sharing of research and of power and responsibility for fish and wildlife management.

The call for co-management and an incorporation of the Native world view is one that that has received increasing recognition throughout the world, as the key means for assuring a meaningful role for indigenous people in the management and preservation of natural resources and the protection of their culture. It has worked in Canada, and in the limited fora allowed in Alaska. I strongly urge the Congress to do what it can to promote and facilitate comanagement as it evaluates amendments to the MMPA.

Pollution of marine mammal habitat and its impacts on marine mammals and the health of indigenous people in Alaska and the circumpolar North

In recent years, it has become increasingly clear that there may well be substantial threats to marine mammal populations from pollution of their habitat, principally by heavy metals. Accumulation of heavy metals in marine mammals in turn may pose threats to the Alaska Natives who rely on them for food. While the evidence is not yet conclusive, there are some disturbing trends.

The beluga whale is reported to be one of the most polluted animals in the world, yet it is one of the preferred foods of my people. It has accumulated vast amounts of mercury and selenium in its organs and meat, and ever-growing amounts of organochlorines such as DDT and PCBs. Heightened levels of organochlorines have also been linked by European researchers to the decline in polar bear reproduction on the islands of the North Atlantic. And according to the Fish and Wildlife Service, "Cadmium concentrations remained higher [in walrus livers and kidneys] than levels thought by EPA to interfere with mammalian organ function (13 mg/kg)." Fish and Wildlife Service, "Heavy Metal Concentrations in Liver and Kidney Tissues of Pacific Walrus," April, 1993. The levels in those walrus organs averaged 166.5 mg/kg with some as high as 457.3 mg/kg. Ibid.

We have been told by the Epidemiologist of the Alaska Department of Health and Social Services that there are no reported incidents of disease related to overexposure of cadmium. It is good to know that we are showing no overt signs of cadmium poisoning. But the Indian Health Service has pointed to an increased level of clear cell cancer of the kidney in Alaska Native males. Is there a link? What should we do about the fact that we are eating walrus livers and kidneys with such elevated levels of cadmium?

The Fish and Wildlife Service has taken tissue samples of walrus, but lacks the funding to analyze them to determine whether the elevated levels of cadmium are causing harm to the walrus

because their kidneys are not working as they should. At least FWS has the raw data on walrus. There are no data or programs to screen polar bears to know if levels of contaminants are going up or down in those animals. We do not even have good data on the number of polar bears in Alaska, Canada or Russia.

As we all know, the health of marine mammals and of Alaska Natives is inextricably tied to the health of the environment. What is being done to the ocean in which these animals live? Protecting marine mammals is the intent of the MMPA, but with our oceans acting as dumping grounds or final repositories of what we put in the air, these important species of mammals are being contaminated. The minimal data we have tell us this; we need much more, and tools to combat the pollution, if we are to manage healthy stocks of all of the marine mammals.

Suggested amendments to the MMPA.

I have several suggestions to make to the Committee with respect to changes in the MMPA. The first, and most important, is one that I most strongly and respectfully recommend that the Committee not do: make any amendment that will or could weaken the current Native take exemption in section 101(b) of the Act. That exemption has worked very well to date; it purposefully and properly gives Alaska Natives the sole responsibility for regulating their own take so long as it is not wasteful, provided that a species is not found to be depleted; and it helps preserve Native customs and traditions by allowing Natives to follow their traditional practices free of intrusive and often inappropriate federal regulation.

I want to emphasize in this respect the concern of the entire Native community that Congress not take any action that could have negative ramifications for Native take in the future. This includes proposals that would replace reliance on the concept of Optimal Sustainable Population with new concepts or matrices to evaluate the health of a species. At present, as with the entire MMPA, the Native take exemption is premised on OSP as the measure of the health of a species. Any effort to change this approach in any context will undoubtably have the unintended effect of establishing a precedent for using the new concept or matrix as a basis for determining when it would be appropriate for the federal government to regulate Native take.

We also would view with concern any efforts to establish acceptable levels of take of marine mammal populations. This may well lead to actual allocation of marine mammal take among user groups, which not only will mean the end of the Native take exemption, but long and bitter fights over allocation that serve no one's interests.

I do have three suggestions to improve the MMPA from the standpoint of Alaska Natives. First, as I have previously discussed, the Native community is hard at work collecting data on

marine mammal populations and health, participating in federal, state and private research, monitoring take, developing ordinances, and enforcing both those ordinances and their traditional rules. These efforts have been stymied to a large extent by a lack of adequate funding. I accordingly suggest that the Congress authorize the appropriation of funds for the purpose of further building and sustaining Native institutional capacities for self-regulation of Native take of marine mammals. In particular, such funding would enable the development of formal codes and ordinances and of data bases, and would also support the work of Native marine mammal commissions as they work for both self-regulation and comanagement relationships with the federal and state governments. The funds should not be made available through the standard granting processes, but made directly to the Native community through the IPCMM. The Council, in turn, would decide how best to allocate the funds.

I believe that the funding I have requested will strengthen the Native exemption by helping to assure that Native self-regulation is as effective as possible. I want to add, however, that this funding should not be used to replace existing funds now being provided to specific Native commissions and organizations, but rather to supplement those funds so that Native management will become even more effective.

My second suggestion relates to protections against impacts on marine mammals and their habitat. Alaska Natives have noted with increasing alarm that heavy metal levels in marine mammals have grown substantially over the past few years. This is due to substantial pollution in the ocean, largely from overseas, but also from industrial operations under the control of the United States. Important habitat areas are also directly threatened by some development activities, such as barge traffic and oil and gas development. And as is all too evident from the ongoing collapse of the Bering Sea, the food supply of marine mammals is being drastically depleted, posing threats not only to them, but to many other species of birds and other animals that rely on the fish.

The MMPA as it is now written does not directly address these issues. It should. I urge the Congress to develop mechanisms that protect not only marine mammals, but also the ecosystem of which they are a part. In addition, adequate funding must be made available to gather the necessary data -- and to allow Alaska Natives full and equal participation in research design, data collection, and interpretation of the results.

Finally, Alaska Natives and their relatives in other countries have faced substantial difficulties from the MMPA's flat ban on importation of marine mammal products. If an Alaska Native travels to visit his or her relatives in Greenland, Canada or Russia, wearing clothing that is made of marine mammal products, he or she cannot bring this or her clothing back into the United States, because of this ban. Similarly, he or she cannot bring back a gift made of marine mammal parts. Nor may a Native inhabitant of these three countries bring their own clothing or gifts to this country.

These prohibitions make little sense. I accordingly suggest that Congress amend the MPPA to allow Alaska Natives to bring home marine mammal products that they own or which they were given as gifts, and to allow Natives from Greenland, Canada and Russia to bring marine mammal products into this country for their own use in this country, or for purposes of giving a gift or using them in a cultural program. To protect against abuses of such an exception, I further suggest that the amendment be limited to prohibit the importation of marine mammal products by Native inhabitants of Greenland, Canada or Russia for purposes of sale.

To be perfectly frank with the Committee, I do not believe that this limitation really is necessary. Natives in other countries are as responsible in their management of marine mammal species as Alaska Natives; and the making of handicrafts for sale in the United States would be an important source of supplemental income for Natives in Canada, Greenland, and Russia who also badly need the money. However, I am sensitive to the fact that some in this country might view allowing imports for sale in this country as leading to wasteful take by non-Alaska Natives for purely commercial purposes. While I believe that this is an inappropriate and unfair assumption to make, I also know that the entire issue of sale is a controversial one. I have accordingly limited the request on imports so as to avoid unnecessary and undue controversy, in the hope and expectation that the specific problems facing Alaska Natives and their relatives in other countries can be easily resolved.

Thank you for this opportunity to testify. I will be happy to answer any questions that the Committee may have.

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STATEMENT ON BEHALF OF
THE MARINE MAMMAL COALITION
BEFORE
THE HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES
SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
ON REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT

February 10, 1994

My name is John A. Hodges. I am a partner with the law firm of Wiley, Rein & Fielding in Washington, D.C. I am General Counsel of the Marine Mammal Coalition, a consortium of marine mammal public display and scientific research institutions.

The Marine Mammal Coalition appreciates this opportunity to present its position concerning reauthorization of the Marine Mammal Protection Act (MMPA).

Public display and scientific research institutions play an essential role in marine mammal conservation. They should be supported, not discouraged. This view is shared by a vast majority of the American people and is crystallized in Congressional policy in the MMPA, which creates a special, favorable category for these beneficial activities and provides for simplified, nonburdensome procedures for them. None of these institutions can afford prolonged, wasteful, crippling administrative procedures, which divert scarce resources from activities Congress has declared to be critically important. Nor can the government afford inefficient and wasteful use of its scarce resources.

Congress, as part of the reauthorization of the MMPA, should reinforce its policy

(1) that public display and scientific research are to be fostered, not hindered;

(2) that permits for these beneficial activities be granted based on simplified, nonburdensome procedures; and

(3) that the National Marine Fisheries Service (NMFS) should not adopt rules that relate to marine

> mammals in captivity -- an area that is subject to extensive regulation by the Animal and Plant Health Inspection Service (APHIS) under the Animal Welfare Act.

A recent NMFS proposal, 58 Fed. Reg. 53320 (Oct. 14, 1993), flies in the face of this Congressional intent. It also results in an inefficient and wasteful use of scarce governmental resources.

We note that APHIS has stated that the NMFS proposed rules

> "specifically attempt to allow the AA [Assistant Administrator for Fisheries, NMFS] authority over the AWA [Animal Welfare Act]. The AA does not have the authority to summarily overrule the AWA."[1]

APHIS also points out that the NMFS proposal

> "authoriz[es] the AA to practice veterinary medicine without a license or a degree in veterinary medicine. This is in violation of the State Practice Acts, which govern the practice of veterinary medicine."[2]

Therefore, Congress should reject this NMFS proposal.

Below, we first discuss Congressional policy favoring marine mammal public display and scientific research and then discuss how the NMFS proposal violates Congressional intent.

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[1] APHIS, Comments on NMFS Proposed Rules on Protected Species Special Exemption Regulations, Jan. 28, 1994 (hereinafter "APHIS Comments"), § I.

[2] APHIS Comments APHIS, § B. See also, e.g., APHIS comment on proposed § 216.37(c) ("This section is especially disconcerting in that it appears that the AA can control veterinary treatment. The veterinary profession is regulated by the appropriate State Practice Acts, State Veterinary Medical Boards, and appropriate FDA and DEA regulations. Even the MMPA does not grant the NMFS the power to regulate veterinary medicine. This also undermines a cornerstone in the AWA regulations, allocating authority to the attending veterinarian."); APHIS comment on proposed § 216.37(1)(2) ("Again, the AA presumes to dictate the actions of the attending veterinarian and/or requires a facility to change its established displays and/or colonies if the AA doesn't agree with it. We cannot support this.").

I. CONGRESSIONAL POLICY FAVORS MARINE MAMMAL PUBLIC DISPLAY AND SCIENTIFIC RESEARCH

A. Marine Mammal Protection Act

The MMPA, originally enacted in 1972, resulted largely from public concern about the thousands of marine mammal mortalities from such activities as sealing, whaling, and some commercial fishing activities. Its basic intent is to conserve wild animal stocks and the ecosystem.

At the same time, Congress recognized the indispensable role of zoological institutions in raising public awareness of marine mammals and intended not to inhibit these institutions from obtaining the small number of animals they need for their beneficial purposes.[3] Congress also

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[3] Congress recognized the important role of public display institutions in relation to marine mammals as "resources of great international significance, esthetic and recreational as well as economic," 16 U.S.C. § 1361(6). During Congressional deliberations on the MMPA, Congressman Pryor said that "the intent of this basic legislation was not to deprive those particular institutions of bringing in a proper number of animals for the public use." Legislation on Preservation and Protection of Marine Mammals: Hearings before the Subcomm. on Fisheries & Wildlife Conservation of the House Comm. on Merchant Marine & Fisheries, 92d Cong., 1st Sess. 83 (1971). Senator Hollings stressed that without observing marine mammals in oceanaria the "magnificent interest" in marine mammals will be lost and "none will ever see them and none will care about them and they will be extinct." Ocean Mammal Legislation: Hearings Before the Subcomm. on Oceans & Atmosphere of the Senate Comm. on Commerce, 92d Cong., 2d Sess. 266 (1972). "[I]f it were not for these organizations and the public exposure you have on these animals in the first place, these matters wouldn't be brought to the attention of the public." Id. 555. Senator Cranston emphasized the "valuable educational service performed by these institutions." Id. 552-53. Senator Chiles stated that he gave "strong support towards recognizing the oceanarium exhibition industry in this legislation." Id. 164. Senator Gurney took note of the "advent of seaquariums and oceanariums" that have brought home "a much greater awareness of . . . ocean mammals." 118 Cong. Rec. S25291 (July 25, 1972). Senator Tunney anticipated "very little difficulty" for public display institutions as a result of the MMPA. Id. S25270.

recognized the important role of scientific research in relation to marine mammals.[4]

Over 100 million people annually visit public aquariums, oceanariums, and other zoological institutions in the United States. These institutions are central to the effort to stimulate public interest in, education about, and support for marine mammal conservation.[5] They are involved in networks sponsored by NMFS to assist stranded marine mammals. They also play a vital role in the life and development of their communities and states. They educate the public, are a source of wholesome recreation, provide significant employment, and stimulate local economies by generating the expenditure of hundreds of millions of dollars by visitors.

In recognition of the essential role that marine mammal public display and scientific research institutions play in carrying out the purposes and policies of the MMPA, Congress created a special, favorable provision for them under the MMPA. MMPA permits for public display and scientific research are a special exception to the Act's moratorium on taking and can be obtained pursuant to simplified requirements (16 U.S.C. § 1371(a)(1)). This regime for public display and scientific research is regulated under a regime separate from the regimes applicable to other activities such as commercial fisheries (§ 1371(a)(2)), and periodic "waivers" (§ 1371(a)(3)(A)). The MMPA is administered in relevant part by NMFS within the Department of Commerce.

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[4] The MMPA recognizes that "there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully." 16 U.S.C. § 1361(3).

[5] Dolphins do well in public display institutions. As stated in a recent federal study, "[c]urrent data indicate that survival rates in captive dolphins may be similar to and, in some cases, possibly better than survival rates in free-ranging dolphins." U.S. Department of Commerce, NMFS, Final Environmental Impact Statement on the Use of Marine Mammals in Swim-With-The-Dolphin Programs, April 1990, p. 68.

Congressional policy in favor of public display and scientific research was reiterated and reinforced in 1988, when Congress reauthorized the MMPA.[6]

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[6] Thus, the House Committee report on the 1988 Amendments stressed that

> "[e]ducation is an important tool that can be used to teach the public that marine mammals are resources of great aesthetic, recreational and economic significance. It is important, therefore, that public display permits be issued to entities that help inform the public about marine mammals, as well as perform other functions.
>
> . . .
>
> Permits may continue to be issued to public and privately owned zoological parks and oceanariums, as well as other qualifying institutions." H.R. Rep. No. 970, 100th Cong., 2d Sess. 33-34 (1988).

Similarly, the Senate Report stated that

> "[e]ffective public display of marine mammals provides an opportunity to inform the public about the great aesthetic, recreational, and economic significance of marine mammals and their role in the marine ecosystem." S. Rep. No. 592, 100th Cong., 2d Sess. 29 (1988).

The Senate Report went on to say that

> "[t]he Committee recognizes that the recreational experience is an important component of public display and that public display has served a useful educational purpose, exposing tens of millions of people to marine mammals and thereby contributing to the awareness and commitment of the general public to protection of marine mammals and their environment." Id.

In the reauthorization, Congress also added enhancement of survival or recovery of a species or stock to the activities covered under Section 1371(a)(1), thus reaffirming that the items in this section are categories considered by Congress to be beneficial to marine mammals. Marine Mammal Protection Act Amendments of 1988, § 5(c), Pub. L. No. 100-711, 102 Stat. 4765 (1988).

This Congressional intent that NMFS procedures for public display and scientific research be simple and non-burdensome was recently reconfirmed by the Court in Animal Protection Institute v. Mosbacher, 799 F. Supp. 173, 179 (D.D.C. 1992):

> "Congress also contemplated that there would be a limited number of instances in which an inconsequential quantity of animals could be taken or imported for beneficent purposes, such as for scientific research, stock preservation, or, as here, for public display. Consequently, in § 1371(a)(1) it gave the Secretary authority to grant a modest dispensation in such cases from the most onerous constraints of the MMPA - the absolute moratorium - without awaiting the outcome of more elaborate administrative proceedings the regulations might require for more destructive assaults upon the population of a species."

B. Animal Welfare Act

In contrast to the MMPA, the Animal Welfare Act of 1975 regulates animals that have already been taken (i.e., are in captivity). The Animal Welfare Act, as amended in 1979, contains provisions dealing exclusively with marine mammals in zoological institutions, establishing strict, comprehensive standards for the size and nature of enclosures, environmental quality, food handling, transport, and humane treatment (hereinafter referred to collectively as "husbandry"). The marine mammal section of the Animal Welfare Act is the strongest animal welfare legislation ever enacted by Congress.

The Animal Welfare Act is administered by APHIS. All facilities that display marine mammals must be licensed -- and thus certified -- by APHIS.

II. NMFS PROPOSAL VIOLATES CONGRESSIONAL INTENT

The NMFS proposal flies in the face of this Congressional intent. It directly contravenes the requirements of the MMPA and imposes unconstitutional burdens. It ignores recent court decisions construing the MMPA.

Contrary to the basic thrust of the MMPA, the NMFS proposal would impose the most onerous regulatory regime under the statute. The proposal would inflict crushing administrative and financial burdens. The information required in applications would be massive. After a permit

was granted, the permit holder would be subject to further authorizations and notifications before it could exercise the permit. It would become bogged down in onerous permit conditions. It would have to file numerous, duplicative reports. Burdensome new fees would be imposed for a number of activities; this would violate the requirement of the MMPA that fees be charged only for issuance of permits and that the fees be reasonable. 16 U.S.C. § 1374(g). And there would be charges for surety bonds, which are not authorized under the MMPA.

A study by Arthur D. Little, Inc. demonstrates that the proposal, if adopted, would impose approximately $32.2 million of costs on public display institutions in the first five years. This figure does not take into account the cost to scientific research institutions (other than scientific research carried out by public display entities) and to the government. This figure also does not take into account other burdens such as the litigation that would inevitably flow from the proposal, the diversion of institutions' energies to dealing with administrative burdens, and the loss of flexibility.

The bulk of the new burdens flows directly from the proposal's violation of the MMPA with respect to the scope of NMFS authority. Based on a bizarre and novel interpretation of the term "take" that is contrary to its own longstanding interpretation, NMFS now claims jurisdiction over marine mammals in captivity and uses its new interpretation to justify a mountain of proposed regulations of marine mammals in captivity. For example, standards for captive care and maintenance, qualifications of staff, design of facilities, groupings of marine mammals in institutional settings, space requirements, etc.

This interpretation directly violates the MMPA. As held recently by the Court in Mirage Resorts, Inc. v. Franklin, CV-S-92-759-PMP (D. Nev., Nov. 24, 1993), the term "take" in the MMPA is confined to activities in the wild and does not cover activities concerning marine mammals in captivity. The Court went on to hold that activities relating to marine mammals in captivity fall within the purview of the APHIS under the Animal Welfare Act. Given the declared unlawfulness of the purported underpinning of so much of the NMFS proposal, the proposal must be rejected.

The proposal directly contradicts a holding of the Court in the Animal Protection Institute decision, namely that Congress did not intend that public display and scientific research be subject to a "consistency" requirement concerning the marine mammal programs of countries from which marine mammals are imported. Ironically, this NMFS proposal would

have the effect of banning the importation of marine mammals even though importation would improve their condition. And, as indicated previously, the proposal violates the further admonishment of the Court (see page 6, supra) that Congress intended that NMFS procedures be simple and nonburdensome.

The proposal violates the MMPA and the Constitution by voiding the rights of persons who possess or wish to possess marine mammals. For example, only "facilities" could hold permits for marine mammals; others would lose their rights to marine mammals, including marine mammals that they now hold. This violates the MMPA, which allows "persons" to have permits, 16 U.S.C. § 1374(c)(1), and takes such persons' property without due process and without just compensation.

Permit holders would have to renew their permits every five years. That obligation would exist despite the fact that the permit had already been exercised. If a permit were not renewed, the possessor of the marine mammals would lose his rights to the animals he possesses. This would violate the terms of the MMPA, which allows a person to possesses a marine mammal once it has been lawfully collected. See, 16 U.S.C. § 1372(a)(3). The proposal in this regard is also an unconstitutional taking of property.

The proposal exceeds the boundaries of the MMPA with respect to educational programs. It violates Congress's admonishment that NMFS not become involved in regulating the content of educational programs. See, 16 U.S.C. § 1374(c)(2); H.R. Rep. No. 970, 100th Cong., 2d Sess. at 34 (1988). NMFS would even prevent entities from selling certain products such as photographs of marine mammals except in restricted circumstances. Such regulation violates the First Amendment rights and is an unconstitutional taking of property.

The proposal directly violates the statutory exemption of pre-Act animals from the requirements of the MMPA. 16 U.S.C. § 1372(e).

The proposal would also authorize the Assistant Administrator for Fisheries to practice veterinary medicine without a license or a degree in veterinary medicine, in violation of State Practice laws governing the practice of veterinary medicine.

The proposal seeks to regulate exports of marine mammals despite the fact that the MMPA does not govern exports and the MMPA does not have extraterritorial applicability, United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977).

The proposal would authorize inspection of facilities without a warrant, in violation of the MMPA, 16 U.S.C. § 1377, and the Constitutional guarantee against unreasonable searches and seizures. NMFS would even have the unfettered discretion to call on private persons to conduct the inspection.

The proposal would adopt the extraordinary concept of a "captive stock" of marine mammals. The MMPA intends that the concept of stocks relates to marine mammals in the wild, not in captivity. See, e.g., 16 U.S.C. §§ 1361(1), (2). The proposal would thus pave the way for NMFS management of marine mammals in captivity, which violates Congressional intent.

III. CONGRESSIONAL RELIEF IS WARRANTED

Despite the Congressionally-mandated simplicity of procedures for obtaining public display and scientific research permits and the small number of animals taken for these purposes, the NMFS proposal would make obtaining such permits a bureaucratic nightmare contrary to Congressional intent, wasteful of federal resources and debilitating to zoological institutions.

The Marine Mammal Coalition believes that legislative action is necessary to restore common sense to the regulatory scheme. Congress should reinforce Congressional intent to have permits issued for the number of animals necessary for public display and scientific research in an expeditious and simplified manner. Congress should also eliminate intrusion by NMFS into animal husbandry matters, which are properly within the jurisdiction of APHIS. Congress should squarely reject the pending NMFS regulatory proposal. The Marine Mammal Coalition looks forward to working with Congress to accomplish these important goals.

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Dolphin Quest
at the Hilton Waikoloa Village

Testimony of Dolphin Quest
before the
House Merchant Marine and Fisheries Committee

February 10, 1994

Dolphin Quest, located at the Hilton Waikoloa Village on the Big Island of Hawaii, is pleased to submit testimony on the reauthorization of the Marine Mammal Protection Act (MMPA). We applaud the Committee for it's action on one of our Nation's most important environmental protection laws.

Dolphin Quest shares this Committee's view on the need to protect the marine ecosystem, and is wholly committed to improving the future well being of our marine environment through education, conservation and research. Indeed, this Committee saw as fundamental to protecting marine mammals and the marine ecosystem the use of public display facilities to educate the public at large on the need to preserve and protect our valuable marine resources.

The goals of public display facilities are concomitant with that of Congress in enacting the MMPA. Among those goals are:

- To help ensure that there are opportunities for the public to learn about marine mammals (including depleted, endangered or threatened species).

- To enhance public appreciation for and understanding of the need for marine mammal conservation both in the United States and worldwide.

- To contribute to an improved, scientific understanding of the physiology, ecology and population dynamics of marine mammals, including the facts which bear upon their ability to reproduce themselves successfully and to survive amidst the growing threats to their existence.

- To inform the public about the benefits of research, education and conservation programs of marine mammals, both in public display facilities and in the wild.

- To encourage the formulation, dissemination and continued development of professionally recognized and age-appropriate education and conservation programs focusing on marine mammals.

- To provide meaningful recreational experiences that will encourage the public to seek further learning opportunities regarding marine mammals.

Dolphin Quest supports the MMPA and does not believe it is in need of major modification. However, we have a unique perspective of the Act and urge the following issues and amendments be considered during the reauthorization:

- Amend the Congressional findings to recognize the value of public education and scientific research by public display institutions in enhancing the conservation of marine mammals.

- Clarify that public display includes interactive exhibition. Scientific studies and real world practice show that people learn more, and retain it longer, when the learning process is interactive. Interactive programs should be included in public display programs where appropriate.

- Amend Section 3 of the MMPA by adding "in the wild" before the period in paragraph 13. This change will clarify NMFS' authority under the MMPA, make it consistent with the original intent of Congress in passing the legislation, and underscore the mandate given to NMFS by Congress to direct NMFS' resources and efforts toward the very serious threats that wild populations of marine mammals face. It will also enable NMFS to continue to govern takes in the wild, regulate activities involving beached and stranded marine mammals, and will allow NMFS to continue its current inventory and tracking data-base.

- Clarify that persons who already have a public display permit do not need yet another permit to (a) transfer marine mammals already in captivity between their own facilities or (b) offer to sell, offer to purchase, or sell, purchase or transport marine mammals already in captivity to another facility which already has a marine mammal public display permit for the species involved.

These changes clarify the statute, make the MMPA more consistent with the original intent of Congress in drafting the legislation, and fully recognize the value that interactive and other public display facilities have in our society.

To this end, Dolphin Quest's education programs, scientific resources, financial and logistical support for research, as well as the overwhelming impact that its public programs have on participants' awareness and concern for dolphins, illustrate the many ways that public display organizations make significant contributions to their communities and to the conservation of the marine environment.

Established by two marine mammal veterinarians, one of Dolphin Quest's primary goals is to provide an interactive learning experience for the public, which inspires appreciation for marine mammals and concern for the conservation of our marine environment. Dolphin Quest has provided an opportunity for more than 26,300 children to learn about dolphins through its publicly available interactive education programs; more than 6,000 school children with a chance to learn about the importance of preserving their local marine resources through a full day education field trip experience; more than 220 educators with the opportunity to attend Dolphin Quest's teacher work shops; and more than 62,000 adults with an opportunity to learn first hand about dolphins.

To illustrate to this Committee the impact and importance of interactive learning which can be provided by public display facilities, attached is a statistical summary of questionnaires which were distributed to Dolphin Quest program participants between December 1988 and September 1993. It is interesting to note that 91.1% of the respondents state that the educational value and personal impact of their experience was greater than books, magazines, newspapers, television programs and nature movies. Additionally, 99.2% believe that an interactive program such as Dolphin Quest will inspire people to actively support environmental issues. Also attached is a statistical summary of questionnaires completed by teachers participating in Dolphin Quest education programs.

Public display facilities also fulfill their commitment to marine conservation by participating in or funding scientific research, participating in marine mammal stranding and convalescence programs and other scientific community activities. Since 1989, Dolphin Quest and the Hilton Waikoloa Village have generated over $405,000 in vital funding for important marine education, conservation and research. A large portion of these funds have been used to support university level field research and educational programs. Through the non-profit Waikoloa Marine Life Fund, established by Dolphin Quest in 1989, individuals and corporate America have the ability to contribute to scientific research. In addition, biological samples obtained voluntarily through behavioral husbandry training from Dolphin Quest dolphins have assisted scientists in the study of dolphin immune and reproductive physiology. In 1991, Dolphin Quest also purchased a $10,950 computer system capable of analyzing dolphin and whale vocalizations for researchers studying cetacean acoustics in Hawaiian waters. This computer system is the beginning of an acoustic laboratory which will function as a base of operations for many cetacean acoustic studies.

In conclusion, Dolphin Quest, as part of the modern oceanarium and zoological community, takes seriously the responsibility associated with the public display of marine mammals. Because public display facilities provide people with a first hand experience and education, the future well-being of marine mammals and their environment are more certain due to an informed and inspired society choosing to take part in marine conservation.

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DOLPHIN QUEST QUESTIONNAIRE
12/9/88 - 9/30/93

Summary of Statistics

Discussion

One of Dolphin Quest's primary goals is to provide an interactive learning experience for the public which inspires appreciation for marine mammals and concern for the conservation of our marine environments. In an ongoing effort to monitor our effectiveness in realizing this goal, Dolphin Quest continually gathers the following input from individuals who have participated in our programs.

9021 Questionnaires were completed and returned to Dolphin Quest between December 1988 and September 1993. Individuals participating in Dolphin Quest programs were given the questionnaire upon completing their Dolphin Encounter. An average of 29% of the questionnaires were returned for compilation which provides a statistically significant representation.

Not every respondent answered every question. Percentages were tabulated based on the number of responses to each specific question. For example, in Question #8 there were 8980 "yes" answers plus 41 "no" answers makes a total of 9021 responses to that question. To get the percentage of "yes" answers, 8980 was divided by 9021 and multiplied by 100. Percentages are then rounded up or down to the nearest percent:

8980/9021 = 0.995455 X 100 = 99.5455% = 99.5%

Question 1: Was your Dolphin Quest experience a positive one?

Yes 100% No 0%

Question 2: Do you feel that the dolphins enjoyed the interaction?

Yes 99.7% No 0.3%

Question 3. Do you feel that the dolphins were treated with respect, care, and sensitivity?

Yes 100% No 0%

Question 4: Prior to your Dolphin Quest experience, what exposure to dolphins have you had? Please Check all that apply:

Observation in the wild	40.9%	Nature movies/TV	84.0%
Lectures/Courses	11.1%	Other	4.8%
Professional Work	1.4%	Books/Nwspr/Magzn	76.3%
Oceanarium	86.5%		

Question 5: Please compare the educational value and overall personal impact of your Dolphin Quest experience with the following: (If you have not experienced one of the following use "NA")

The educational value and overall personal impact of my dolphin experience was...

89.6% Greater than 6.6% Equal to 3.8% Less than Nature movies/TV
90.5% Greater than 6.5% Equal to 3.0% Less than Lecture/Courses
92.6% Greater than 5.4% Equal to 2.0% Less than Book/Nwspr/Magazine
89.6% Greater than 7.4% Equal to 3.0% Less than Observation in the wild

Question 6: Was information regarding marine mammal conservation presented in your dolphin Program?

Yes 99.1% No 0.9%
Marine mammal conservation issues are always presented during Dolphin Encounters; it is significant that 99.1% of participants are clearly hearing this vital information. The personal, interactive format of the Dolphin Quest encounter is highly effective in focusing participants' attention on the education and conservation information presented.

Question 7: Did your knowledge about dolphins increase through the encounter program?

Yes 98.4% No 1.6%

Question 8: Would you recommend that such interactive programs continue as a means to increase public sensitivity and appreciation of dolphins and dolphin concerns?

Yes 99.5% No 0.5%

Question 9: Do you believe that an interactive experience such as Dolphin Quest, will inspire people to actively support environmental issues?

Yes 99.2% No 0.8%

SAMPLES OF COMMENTS FROM DOLPHIN QUEST QUESTIONNAIRES

•"We were at the Hyatt doing a location inspection for our 1994 seminar. Dolphin Quest was the greatest experience the hotel had to offer and is one of the main reasons I will be bringing my group there in 1994."

•"We loved it so much, we are already looking ahead to our next visit."*"It was a very good experience!! I loved it and would do it again anytime."

•"I thought the entire experience was excellent and I commend the Hyatt for helping support the program. Both the dolphins and the staff really appear to enjoy what they are doing. This is a great way to increase awareness of marine life and environmental issues."

•"I loved the experience. It was very enjoyable and educational. Dolphin Quest was our sole purpose for visiting this island and this hotel."

•"This was truly a high point in my life, it's been a dream for me since I was a child. Thank you for protecting this wonderful species."

•"The dolphin experience was a wonderful, unique opportunity which should be continued to inform others about our friends in the sea."

•"This was a highlight in my life! Almost a religious experience. Thanks for the time you have taken to educate us!"

•"The trainers really seemed to love the dolphins and did their best to make it a positive experience for us. I thoroughly enjoyed it and am sure it will be my fondest memory of Hawaii."

•"This was a wonderful experience. It made my vacation. The dolphins are so beautiful."

•"It was absolutely incredible, Thank you for the wonderful experience."

•"This was truly a wonderful experience. I would highly recommend this to anyone. Words can't express what a great time this was."

•"A special thank you to all of you. This is a very unique experience and one my husband and I will treasure with our vacation memories. Thanks again and great job."

•"We would not have come to the "Big" island had it not been for the Dolphin Quest at the Hyatt Waikoloa!!"

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Dolphin Quest at the Hilton Waikoloa Village

"DISCOVER DOLPHINS" TEACHER QUESTIONNAIRE
1/1/91 - 5/31/92

Summary of Statistics
6/4/92

Discussion

Teachers were given a short questionnaire when their class completed the "Discover Dolphin!" education program. Approximately 50% of the teachers took the time to complete these evaluation forms and mail them back to us. Many classes also sent thank you letters, poems, stories, and art work.

RATINGS:

Percentages were tabulated based on the number of responses to each specific question. Each percentage number was carried only to the tenth position; nothing was rounded off. Not every respondent answered every question.

QUESTION 1: Do you feel it was a valuable educational experience to participate in the "Discover Dolphins" educational program which consisted of four components:

directed teaching/discussion	Yes 100%	No 0.0%
activities/choosing time	Yes 100%	No 0.0%
film/slides	Yes 100%	No 0.0%
dolphins/lagoon with trainers	Yes 100%	No 0.0%

QUESTION 2: Was the content appropriate to your grade level?

teaching/discussion	Yes 100%	No 0.0%
activities/choosing	Yes 100%	No 0.0%
film/slides	Yes 100%	No 0.0%
dolphins/lagoon	Yes 100%	No 0.0%

QUESTION 3: Was the allotted time suitable to learning?

teaching/discussion	Yes 100%	No 0.0%
activities/choosing	Yes 100%	No 0.0%
film/slides	Yes 100%	No 0.0%
dolphins/lagoon	Yes 79%	No 21%

Comments indicated that teachers and students enjoyed the dolphin program so much they would have preferred it to be longer.

QUESTION 4: Did your students enjoy the "Discover Dolphins!" education program?

Yes 100% No 0.0%

QUESTION 5: Are your students better informed about marine mammal conservation issues because of this program?

Yes 100% No 0.0%

*** Questions 6,7,8 and 9 are relevant for program development purposes. We are including the results for your review.**

QUESTION 6: Are the follow up activity suggestions of benefit to you?

Yes 100% No 0.0%

(Dolphin Quest provides two pages of suggestions for classroom learning activities to reinforce the marine science lessons taught in the "Discover Dolphins!" field trip program.)

QUESTION 7: Is this field trip part of a larger instructional unit in the classroom?

Yes 93% No 7%
If yes, what is the main focus of the study unit? *answers varied*
What other curriculum components are used in this unit?
books 68% films 36% work sheets 57% activities 54%
chapter in text book 39% other 32%

QUESTION 8: Would you be interested in borrowing educational videos and other instructional materials to enhance your marine science curriculum at school?

Yes 100% No 0.0%

QUESTION 9: Would you be interested in attending a teacher training workshop about marine mammals?

Yes 100% No 0.0%

STATEMENT OF ROBERT L. DEWEY
DIRECTOR, HABITAT CONSERVATION DIVISION
DEFENDERS OF WILDLIFE
ON
POLAR BEAR CONSERVATION
AND REAUTHORIZATION OF THE
MARINE MAMMAL PROTECTION ACT
FOR
THE SUBCOMMITTEE ON
ENVIRONMENT AND NATURAL RESOURCES
MERCHANT MARINE AND FISHERIES COMMITTEE
U.S. HOUSE OF REPRESENTATIVES
MARCH 10, 1994
ON BEHALF OF
DEFENDERS OF WILDLIFE
AND
THE WILDERNESS SOCIETY

At the invitation of the House Committee on Merchant Marine and Fisheries, this statement is being submitted on behalf of Defenders of Wildlife and The Wilderness Society for inclusion in record of the February 10, 1994 hearing on the Marine Mammal Protection Act held by the Subcommittee on Environment and Natural Resources. The statement focuses on the need for Congress to amend the Marine Mammal Protection Act to provide the U.S. Fish and Wildlife Service (FWS) with affirmative authority to protect polar bear habitat. The United States is obligated to protect polar bear ecosystems, especially denning, feeding and migration areas, under Article II of the Agreement on the Conservation of Polar Bears, an international treaty signed by the U.S. in 1973.

Defenders of Wildlife is a national conservation organization with over 80,000 members. Polar bear conservation issues, especially those relating to habitat protection, have long been a high priority of Defenders. For several years we have served on an informal advisory team established by the FWS in conjunction with the preparation of the Conservation Plan for the Polar Bear in Alaska, a final version of which should soon be released by the FWS. Defenders also submitted comments on a recent FWS proposal to issue regulations allowing the incidental take of polar bears during oil and gas exploration and development activities in the Beaufort Sea. Concerns expressed by Defenders regarding the potential impact of the proposed regulations on U.S. compliance with the Agreement on the Conservation of Polar Bears helped prompt the FWS to announce its intention to develop the Polar Bear Habitat Conservation Strategy. Although pleased by FWS plans to develop this Strategy, Defenders of Wildlife shares concerns expressed in written testimony submitted by the FWS and the Marine Mammal Commission regarding the current limits of FWS legal authority to fully implement an effective habitat protection regime.

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Recent Developments Concerning Polar Bear Habitat Protection

Several recent developments have helped to underscore the need for Congress to clarify the FWS' authority to protect essential polar bear habitat. On November 16, 1993, the FWS announced plans to develop a Polar Bear Habitat Conservation Strategy (58 Fed. Reg. 60402) (Polar Bear Strategy).[1] The Polar Bear Strategy, if well designed and fully implemented, has the potential to be an effective means of safeguarding essential polar bear habitat. It can also assure that the United States acts in full accordance with the habitat protection mandate contained in the Agreement on the Conservation of Polar Bears. Finally, an effective Polar Bear Strategy would serve as a model for other Arctic nations, which collectively have the responsibility of safeguarding the world's polar bear populations.

Congressional action to provide the FWS with additional authority to protect polar bear habitat could not come at a more important time. Apart from the need to clarify the legal basis for an effective Polar Bear Strategy, the Department of the Interior and the State of Alaska continue to allow substantial oil and gas leasing in the waters off the coast of northern Alaska. In recent years, respected individual scientists, the Marine Mammal Commission and the FWS have all expressed concern about the potential impacts of oil and gas activities on polar bear populations. Finally, an exhaustively researched and comprehensive legal review, completed for the Marine Mammal Commission just a few months ago, concluded that the FWS lacks affirmative authority to regulate polar habitat under the MMPA.

Biological Considerations in Protecting Habitat

Polar bears inhabiting the U.S. Arctic are divided into two overlapping populations. Both populations are located in the Arctic Ocean, adjacent to Alaska's northern coast. The northern, or Beaufort Sea, population is estimated to be 1,800 individuals. The western, or Bering-Chukchi Sea, population includes about 3,200 animals.[2] Individuals in these populations spend most of their lives on pack ice well off shore from the coast of northern Alaska. Bears in the Chukchi population make extensive north-south migrations in the United States and Russian Territories. In the Beaufort Sea, polar bears make extensive east-west movements between the United

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[1] In a subsequent Federal Register notice (58 Fed. Reg. 68659) issued on December 28, 1993, the FWS referred to the Strategy as a "Polar Bear Habitat Protection Strategy."

[2] M. Beattie, Testimony Before the House Subcommittee on Environment and Natural Resources (February 10, 1994).

States and Canada.[3] Open water or active ice areas which persist throughout winter and early spring are preferred hunting and feeding areas for polar bears, which eat primarily ringed seals. These open water areas are called "polynyas" and run parallel to the coastline.[4]

Maternity denning habitat is especially important to protect because, as noted by the FWS, this is "where reproductive success can most easily be altered."[5] Pregnant female polar bears typically build maternity dens in October or November, give birth to one or two cubs in December, and remain inside the den until March or early April. During this period, the new born cubs depend on the den and their mother for protection. Successful rearing requires a relatively undisturbed denning environment.[6] The coastal plain of the Arctic National Wildlife Refuge and Russia's Wrangel Island are two areas known to be especially important polar bear denning habitat of the United State's two populations of polar bears. In the Beaufort Sea, the FWS has found that 43% of radio collared pregnant females come on shore to den within the Arctic National Wildlife Refuge.[7] This represents a significantly higher concentration of polar bear dens than would be expected if dens were distributed evenly across the coast. Apart from the fact that Wrangel Island is an especially important denning area for members of the Chukchi Sea population, less is known about other preferred denning locations for that population.

Current Threats to Polar Bear Habitat

The protection of key polar bear ecosystems, especially denning, feeding and migration areas, from industrial activities is vital to the long-term conservation of U.S. polar bear populations and to the fulfillment of U.S. treaty obligations. As the FWS recently noted: "Human activities in the Arctic, particularly those related to oil and gas exploration and development, may pose risks to polar bears and other wildlife."[8] Moreover, the Marine Mammal Commission expressed concern about the impact of oil

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[3] FWS, Draft Conservation Plan for the Polar Bear, 13 (December, 1993) ("FWS Plan").

[4] I. Stirling, Polar Bears, 63 (1988).

[5] FWS Plan at 17.

[6] Steven Amstrup & Douglas DeMaster, Polar Bear, in Marine Mammal Commission, Selected Marine Mammals of Alaska 45 (1988).

[7] FWS Plan, at 18.

[8] FWS Plan, at 18.

and gas activities in a 1989 report.[9] Further, in 1991 congressional testimony, polar bear expert and Marine Mammal Commissioner Jack Lentfer noted: "Any new activity that adversely affects denning would likely decrease cub survival and thereby lower recruitment and cause the population to decline."[10] In commenting on proposals to permit oil exploration and drilling on Alaska's coastal plain, Mr. Lentfer added: "A prohibition on oil and gas development on the refuge is especially necessary in order to protect polar bears during the denning period."[11] While the Chukchi and Beaufort Sea populations appear stable, the fact that polar bears have low reproductive rates and are easily disturbed by the noise, sights and smells of human activities make them highly susceptible to population crashes.

The level of oil exploratory activity in the Arctic Ocean waters off the coast of northern Alaska has been relatively low in recent years. Over the next five years, however, the level of oil and gas company activity may increase as exploration and development continues and more state and federal lands and waters are offered for lease. Oil industry documents recently cited by the FWS estimate that, in the Beaufort Sea over the next five years, 28,000 miles of seismic exploration and 2-19 exploratory wells are planned for the open-water, and 7,000-10,000 miles of seismic exploration and 5-15 exploratory drilling operations are planned on the coastal plain and ice-covered waters.[12] The FWS has noted that winter activities "have a far greater possibility of having a detrimental impact on the polar bear,"[13] yet the incidental take regulations issued on November 16, 1993 for the Beaufort Sea cover oil and gas exploration, development, and production year-round.[14] Moreover, as the FWS has pointed out: "Future oil discoveries, if determined to be economically viable, could change the level of activity."[15] Rising oil prices or a major find in the Chukchi or Beaufort Sea could dramatically increase the level of oil and gas activity in the region and directly increase the risk to polar bears and their habitat.

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[9] Marine Mammal Commission, Workshop on Measures to Assess and Mitigate the Adverse Effects of Arctic Oil and Gas Activities on Polar Bears (1989).

[10] J. Lentfer, Testimony Before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment (June 11, 1991).

[11] Id.

[12] 58 Fed. Reg. 60405 (1993).

[13] 58 Fed. Reg. 60406 (1993).

[14] 58 Fed. Reg. 60402 (1993).

[15] FWS Plan, at 18.

Risks to Polar Bear Denning Habitat

Research has shown that polar bears are especially vulnerable during denning. Because of their low reproductive rate, successful denning is crucial to the well-being of polar bear populations. Human disturbance can cause female bears to abandon their dens, an action likely to result in the death of their cubs. There are a number of documented instances of polar bears emerging prematurely from their dens after being disturbed. In fact, one such disturbance occurred in the Arctic Refuge in 1985.[16] In that case, vehicles supporting an exploratory oil well were the source of the disturbance. Oil company helicopters, ships, road construction and traffic, seismic surveys, drilling and oil transport activities are all potential sources of denning disturbance.

Risks to Polar Bear Feeding and Migration Routes

In addition to the harm caused by disrupting denning activities, oil and gas exploration activity may also disturb polar bear feeding and migration patterns. Polar bears may be harassed by aircraft, ships and other vehicles. Bears may be forced to avoid favored feeding areas and migration routes, or, alternatively, be attracted by the sights and smells of human activity, thus increasing the possibility of dangerous human-bear encounters. In addition, polar bear habitat can be also be damaged or destroyed by dumping, dredging, drilling, and construction of platforms, pipelines, roads, and support facilities.

Oil Spills

The polar bear, its food, and its habitat could be severely impacted by acute and chronic oil-spills. According to the FWS, "Bears which have been fouled by oil may suffer thermo-regulatory problems, ingest oil, and may exhibit other detrimental effects such as inflammation of the nasal passages or central nervous system. Bears that contact oil are likely to die."[17] Although the FWS may believe that the probability of a major spill is low, the agency has admitted that the impact of such a spill on polar bears and their Arctic ecosystem would be substantial.[18] Furthermore, the capability of oil companies cleaning up a major spill in the Arctic is highly questionable. Not only could extreme weather conditions make it difficult to get to the spill site, but oil trapped in ice would be very hard to recover.[19]

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[16] The Arctic Dispatch (March 14, 1985).

[17] 58 Fed. Reg. 60407 (1993).

[18] 58 Fed. Reg. 60406 (1993).

[19] For additional background on the risks of oil spills in Arctic waters, see generally Greenpeace, Oil in Arctic Waters: The Untold Story of Offshore Drilling in Alaska (1993).

U.S. Obligations Under the Agreement on the Conservation of Polar Bears

The Agreement on the Conservation of Polar Bears was formally ratified by the U.S. Senate in 1976. Five Arctic nations are signatory to this treaty: the United States, Canada, Russia, Norway and Denmark. The treaty was prompted by concern that, without immediate international action, the polar bear might become endangered. Through their participation in the Agreement, Arctic nations assumed a number obligations, including restrictions of the taking polar bears and habitat protection. The obligation of signatory nations to protect polar bear habitat is contained in Article II, which states:

> Each Contracting Party shall take appropriate action to protect the ecosystems of which polar bears are a part, with special attention to habitat components such as denning and feeding sites and migration patterns, and shall manage polar bear populations in accordance with sound conservation practices based on the best available scientific data.

A December 1993 legal review conducted for the Marine Mammal Commission (MMC) entitled Reconciling the Legal Mechanisms to Protect and Manage Polar Bears Under United States Laws and the Agreement to Protect Polar Bears notes that Article II establishes "three obligations" on the part of signatory nations:

> 1) to take "appropriate action to protect the ecosystem of which polar bears are a part;"
>
> 2) to give "special attention to habitat components such as denning and feeding sites and migration patterns;" and
>
> 3) to manage polar bear populations in accordance with "sound conservation practices" based on the best available scientific data.[20]

According to the MMC Legal Review:

> [T]he ecosystem and habitat requirements of Article II go beyond the protection of the area actually occupied by bears. Instead, it applies to all components of the Arctic environment. The Agreement makes the protection of these areas a mandatory duty. It appears, however, by providing that "appropriate action" should be taken to protect these areas, the parties intended this concept to be a

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[20] D. Baur, Reconciling the Legal Mechanisms to Protect and Manage Polar Bears Under United States Laws and the Agreement for the Conservation of Polar Bears (1993) ("MMC Legal Review") at 42. NOTE: Excerpts from this document are included as an attachment to this statement.

> flexible affirmative duty, rather than a carefully circumscribed mandate to take certain actions.[21]

While it was generally assumed at the time of Senate ratification that the Agreement would be implemented domestically through the Marine Mammal Protection Act (MMPA), this Act insufficiently protects polar bear habitat. As noted in the MMC Legal Review:

> [T]he United States lacks any legal authority that confronts polar bear habitat/ecosystem protection head on. . . . [Current authorities] do not provide affirmative means or duties to protect polar bear habitat and the ecosystem of which it is a part.[22]

Congressional Action Is Needed

FWS Should be Given Affirmative Authority to Protect Polar Bear Habitat

Despite the requirements of the Agreement on the Conservation of Polar Bears, neither Congress nor the U.S. Fish and Wildlife Service has developed a proactive regime to protect polar bear habitat in the 18 years since the Senate ratification. As previously noted, the FWS is finally in the process of developing a Polar Bear Habitat Conservation Strategy, which it expects to complete by June 1995. To assure that the FWS has clear legal authority to take the actions it determines are necessary to protect polar bear habitat fully, Congress should amend the MMPA. Such an amendment should give the FWS full affirmative authority to protect essential polar bear habitat both on land and in the waters off the coast of Alaska. Clear authority for onshore areas will assure that the FWS can protect key land denning areas. Additional offshore authority will assure that the FWS can protect other important denning, feeding and migration areas that may be identified by the Polar Bear Strategy.

During the final negotiating session for the Agreement on the Conservation of Polar Bears, Curtis Bohlen, Chief of the U.S. delegation, told the other negotiators that the United States intended the treaty to designate "a large portion of the Arctic region as an area where the polar bear would enjoy total protection."[23] He added: "Anything less would be unacceptable to the American people, for whom the polar bear has become both an example of wanton killing for the sake of short-term economic gain and

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[21] MMC Legal Review at 45.

[22] MMC Legal Review at 129-130.

[23] Final Act and Summary Record of: The Conference to Prepare and Agreement on the Conservation of Polar Bears 19 (1980).

a symbol of the fight to stop the continuing destruction of man's own ecosystem."[24] We submit that the time has come for Congress to give the U.S. Fish and Wildlife Service the authority it needs to protect polar bear habitat and to make good on an important, but long overlooked, wildlife treaty obligation.

Congress Should Not Deregulate Oil Company Activities Affecting Polar Bears

In addition to amending the MMPA to improve the regime for polar bear habitat protection, the Committee should make sure that it does not reduce the existing statutory regime used to regulate oil and gas activities in polar bear habitats. Specifically, Section 101(a)(5)(A) of the MMPA provides the FWS with authority to review and regulate some of the potential impacts of oil company activities on polar bears and, to a certain extent, polar bear habitat. Although Congress should supplement this provision by providing the FWS with clear and affirmative authority to protect polar bear habitat directly, Section 101(a)(5)(A) serves as an important means of regulating oil and gas activities. The provision also provides a primary statutory basis FWS is using to develop a Polar Bear Habitat Conservation Strategy. For these reasons, we strongly oppose deregulatory proposals to create a separate process for oil company activities that harass polar bears. Since lethal takes resulting from oil and gas activities are prohibited under the Polar Bear Agreement, all petitions for the incidental taking of polar bear submitted by oil companies will be for so-called "harassment takes." Since, with respect to the impact of oil company activities on polar bear denning behavior, the distinction between harassment and lethal taking is a very fine one (i.e. harassment takes are likely to be fatal to polar bear cubs), it is wholly inappropriate to change the existing regulatory regime. Moreover, as noted above, such a change might call into question FWS' statutory basis for developing a Polar Bear Habitat Conservation Strategy.

Congress Should Not Allow the Importation of Polar Bear Trophies

Finally, we oppose proposed amendments to Section 104 which would allow the importation of polar bears trophies from Canada. We believe that such an amendment is unnecessary in view of the existing waiver provision contained under Section 101(a)(3)(A) of the MMPA. This waiver provision assures that any import would be conducted in a biologically sound manner. Moreover, such an amendment runs counter to the wildlife protection intent of the Marine Mammal Protection Act. There is simply no compelling reason to set a precedent that undermines the protective nature of one of this nation's most important wildlife statutes.

We appreciate the Committee's interest in this matter and urge the committee to address this concern during the reauthorization of the Marine Mammal Protection Act by adopting appropriate amendments to clarify the FWS' authority in this area.

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[24] Id.

Excerpts from

RECONCILING THE LEGAL MECHANISMS TO PROTECT AND MANAGE POLAR BEARS UNDER UNITED STATES LAWS AND THE AGREEMENT FOR THE CONSERVATION OF POLAR BEARS

Prepared for the
Marine Mammal Commission

By

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EXECUTIVE SUMMARY

In consecutive years - 1972 and 1973 - the United States enacted landmark legislation to protect marine mammals (the Marine Mammal Protection Act ("MMPA")) and joined with four other countries in an international agreement to protect the world's polar bear populations (the Agreement on the Conservation of Polar Bears). See Addendum. Although both initiatives borrowed heavily from the concepts and goals of each other (deliberations leading up to the MMPA and the Agreement occurred concurrently), the provisions of the final law and international treaty did not result in a perfect fit. In some respects, the MMPA has proven to be more protective than the Agreement, and vice versa. These inconsistencies persist today, even though section 108(a)(4) of the MMPA requires the federal government to seek comparable levels of protection for marine mammals under the MMPA and international agreements, and Article VI.1. of the Agreement requires each party to enact legislation to fulfill its requirements.

Polar bears remain at risk from human activities. In the early 1970s, the principal threat was from hunting and the cumulative effect of other lesser sources of impacts. Under the Agreement and the MMPA, the threats posed by sport hunting have been largely eliminated. Other threats exist, however. These include: the possibility of injury or death to bears caused by development activities; damage or destruction to polar bear habitat from those activities; contamination of the

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food chain of which polar bears are a part; harassment as a result of increased human presence in areas occupied by polar bears, especially denning areas. There also is the potential that Native take for subsistence/handicraft purposes could adversely impact polar bear populations. At present, there is no evidence that Native take is adversely affecting polar bear populations. However, a better understanding of these impacts is needed and if other sources of impacts on polar bear populations increase, the resulting cumulative effects could cause population declines.

To fully address these threats to polar bear population stocks and provide the level of protection contemplated by the drafters of the MMPA and the Agreement, both legal authorities would have to be amended. By carrying the strong points of the MMPA and the Agreement forward into each other, a uniform set of legal principles would be established to govern both international and United States domestic efforts to protect and conserve polar bears. Policy decisions must be made whether it is appropriate to pursue some or all of the changes that would be required to bring the MMPA and the Agreement into full conformance with each other.

To more fully implement the Polar Bear Agreement, a number of amendments could be undertaken. Legal authority to protect polar bear habitat could be expressly set forth. Such authority is not directly provided for in the MMPA or other United States laws. One way to accomplish this is by amending

the definition of "take" in the MMPA to add the prohibited act of "harming" marine mammals. Under the Endangered Species Act, "harm" has been construed to include destruction or degradation of habitat, and this prohibition could be carried forward to the MMPA. In addition, the rulemaking authority of the MMPA could be amended to authorize the Secretary to designate protected areas where activities that would adversely affect polar bears (or other marine mammals) would be prohibited or restricted such as, for example, to prevent depletion. Finally, efforts could be made to strengthen the implementation of existing laws that apply to habitat protection, such as the Outer Continental Shelf Lands Act.

In addition to providing for habitat protection, the MMPA could be brought into conformance with the Polar Bear Agreement by prohibiting the following: the use of aircraft and large motorized vessels to take polar bears, including by Alaska Natives; the taking of cubs and females with cubs, including by Alaska Natives (if desired to conform with the non-binding Resolution to the Agreement); the taking of polar bears from the wild for public display purposes; and lethal incidental take. Finally, the MMPA could be strengthened to more fully effectuate the Agreement by imposing affirmative duties on the federal government to take the necessary actions to protect polar bears (as well as other marine mammals). Such a requirement exists in the Endangered Species Act and other environmental laws, and it could be carried forward to

the MMPA. In addition to these legislative actions, steps could be taken to assist Alaska Natives in their efforts to regulate their polar bear harvests, such as is currently being done for the Beaufort Sea polar bear population in a cooperative agreement between the North Slope Borough Fish and Game Management Council and the Inuvialuit Game Council of Canada's Northwest Territories. Native communities in Alaska have a strong record of self-regulation in order to ensure the long-term viability of wildlife populations. This tradition could be bolstered by the federal government to advance the goals of the Agreement.

There are also amendments that could be made to the Polar Bear Agreement to make it consistent with the MMPA. These changes to the Agreement include: adding a prohibition on harassment; authorizing limited forms of incidental take (if a harassment prohibition is added); and authorizing control of nuisance animals. As in the case of amendments to the MMPA, policy decisions need to be made on the value of pursuing these amendments and the need for conformance between the Agreement and the MMPA in every respect.

Obviously, not all of these changes are of equal importance. The purpose of this report, as requested by the Marine Mammal Commission, is to identify areas of inconsistency and discuss possible solutions, including amendments to existing laws. Ultimately, policy judgments will have to be made on whether and, if so how, to pursue the actions identified in this report.

The following excerpt is from the report section entitled "The Polar Bear Agreement"

2. Habitat Protection

Article II of the Polar Bear Agreement imposes three obligations on the parties:

1) to take "appropriate action to protect the ecosystem of which polar bears are a part;"[140]

2) to give "special attention to habitat components such as denning and feeding sites and migration patterns;"[141] and

3) to manage polar bear populations in accordance with "sound conservation practices" based on the best available scientific data.[142]

The IUCN drafts limited Article II to the protection of unspecified habitat components located within the boundaries of each party. It also required international cooperation to protect polar bears that migrate across international boundaries. The parties greatly expanded this Article by: 1) requiring efforts to protect the overall ecosystem upon which polar bears depend; 2) specifying the habitat components

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[140] Id. Art. II.

[141] Id.

[142] Id.

of greatest concern; and 3) requiring management based on "sound conservation practices."

The habitat and ecosystem protection goal of Article II received special consideration at the 1981 Consultative Meeting of the Parties.[143] The contracting parties agreed at the 1981 meeting that more had to be done to protect the specified habitat areas. They determined, for example, that national efforts should be directed towards identification of important denning and feeding areas. They also agreed that more needed to be done to protect such areas "from disturbance and destruction."[144] The parties singled out "the desirability of providing adequate protected zones around identified denning areas, where disturbances due to human activities otherwise may occur."[145] This goal was stated clearly by the head of the United States delegation to the 1973 meeting of the parties, Mr. Curtis Bohlen, who stated the desire of the United States to achieve the "designation of a large portion of the Arctic region as an area where the polar bear would enjoy total protection." He also cited the need for "the protection of the polar bear's ecosystem including his habitat

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[143] IUCN, Consultative Meeting of the Contracting Parties to the Agreement on the Conservation of Polar Bears (1981).

[144] Id. at 3.

[145] Id.

and food supply; and particularly the preservation within national areas of critical denning areas."[146]

With regard to the ecosystem protection obligation, the parties recognized the need to provide protection to the Arctic region "as a whole." Consideration was given to the need to use the "same lines as the polar bear cooperation is based on" to provide "improved protection of flora, fauna and nature in the Arctic."[147] Specific reference was made to the IUCN World Conservation Strategy, which included a proposal for "developing agreements among the Arctic nations on the conservation of the region's vital biological resources based on the principles and experience of the Agreement on Conservation of Polar Bears."[148]

Included in the record of the 1981 meeting is a statement by Dr. Lee Talbot, the IUCN representative, who noted that the concept of Arctic ecosystem protection began with the 1965 Polar Bear Specialist Group. Dr. Talbot, observed that, "[t]he modern search for and exploitation of non-renewable resources, which was just getting underway fifteen years ago, has continued and intensified, with major impacts on the

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[146]Final Act and Summary Record of: The Conference to Prepare an Agreement on the Conservation of Polar Bears 19 (1980)("Final Act/Summary Record").

[147]Id. at 69.

[148]Id. at 73.

social structures and economics, as well as the environment of a no longer remote Arctic."[149] In light of these changes, he observed:

> If there were gaps and missing pieces to start with in our knowledge and actions about polar bears, there are even more now in a much broader context, with changes occurring more rapidly and so much more at stake. If we were able to gain by cooperating and exchanging information about polar bears the arguments do indeed seem persuasive for extending this pattern of mutual help to include a wider range of present day Arctic problems.[150]

As these statements suggest, the ecosystem and habitat requirements of Article II go beyond the protection of the area actually occupied by bears. Instead, it applies to all components of the Arctic environment. The Agreement makes the protection of these areas a mandatory duty. It appears, however, by providing that "appropriate action" should be taken to protect these areas, the parties intended this concept to be a flexible affirmative duty, rather than a carefully circumscribed mandate to take certain actions.[151] Because Article II provides that such actions "shall" be taken, it is clear that the parties have an obligation to

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[149] Id. at 75.

[150] Id. at 75-76.

[151] The explanatory notes on the July and September 1973 IUCN drafts make it clear that the word "appropriate" was used to signal that contracting parties reserve the right to pursue "differing" approaches to fulfilling their commitments under the Agreement. See Polar Bear Agreement, July, September 1973 IUCN Drafts, supra n.120, 121, at 2, 3.

implement the "appropriate" habitat and ecosystem protection actions.

There is no discussion of the meaning of the phrase "sound conservation practices" in the background documentation of the Agreement. In a resolution passed by the parties during the 1973 Oslo meeting, however, it was specified that the taking of females with cubs and their cubs would be contrary to "sound conservation practices."[152]

The following excerpt is from the report section entitled "Reconciling United States Laws and the Polar Bear Agreement"

5. Habitat and Ecosystem Protection

There are a variety of legal measures available to the United States to protect polar bear habitat. MMPA regulations and letters of authorization issued under section 101(a)(5) can prohibit or restrict activities in important habitat areas if they would involve the take of polar bears. Because the greatest threat to polar bear habitat results from the harassment of bears in denning areas, taking restrictions under section 101(a)(5) might address a major concern under Article II of the Agreement. OCSLA leases, exploration permits, and development plan authorizations could be conditioned in the same way. National Environmental Policy Act reviews can identify threats to polar bear habitats, and any resulting decisions can be appropriately tailored to avoid such impacts. Finally, the CZMA can be applied to restrict development in coastal areas that would harm such habitat.

Despite these available mechanisms, the United States lacks any legal authority that confronts polar bear habitat/ecosystem protection head on. All of the above-cited authorities are preventative in nature; they do not provide affirmative means or duties to protect polar bear habitat and the ecosystem of which it is part. Thus, although it cannot be said that the United States has failed to comply with the Agreement to date by allowing polar bear habitat to be adversely impacted, neither can it be said that the United

States has readily available tools that would allow it to take steps to set aside polar bear habitat/ecosystems so that they are fully protected as envisioned by the Agreement.

Such authority is most directly applicable to habitat impacts that cannot be regulated under the MMPA taking prohibition. These include: permanent damage or destruction to denning areas; long-term occupation of such areas effectively rendering them unusable by bears; obstructions to bear movement routes that cause them to avoid or abandon preferred habitat locations; contamination of feeding areas; degradation of the ecology of the Arctic causing the contamination of prey species; cumulative impacts from development activities; and releases of contaminants that expose bears to the risk of injury or harm, such as the recently documented exposure to PCBs and other contaminants.[350]

There are several forms of legal authority that could be established to provide the United States with tools to achieve permanent habitat protection for polar bears, should a policy decision be made to pursue such a result. Although this authority could be limited to polar bear habitat/ecosystems, it also could be beneficial for other marine mammals in light

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[350] See, e.g., Doug Mellgren, PCBs Suspected in Fewer Polar Bear Births, Anchorage Daily News, Jan. 24, 1993, at F1; J. Lentfer and W. Galster, Mercury in Polar Bears from Alaska, Journal of Wildlife Diseases 338 (1987); J. Lentfer, Environmental Contaminants and Parasites in Polar Bears, Final Report to Alaska Dep't of Fish and Game 7-13 (1976).

of the MMPA general statements of policy that promote habitat protection for all species and stocks. The most obvious of these is the inclusion of important habitat areas in protected areas that are off-limits, at least seasonally, to activities that could adversely affect polar bears. Such protection currently is provided in various locations in the Arctic by the Bering Land Bridge National Preserve, Cape Krusenstern National Monument, and Arctic National Wildlife Refuge.

Another possibility is the use of the MMPA's rulemaking authority to designate protected zones for the purpose of preserving habitat. Although an argument can be made that such authority exists in section 112(a) of the MMPA,[351] it has been used for this purpose only twice, -- by FWS to protect manatees by designating speed boat zones in Florida waters and by the National Park Service to establish cruise ships limits and restricted areas in Glacier Bay. In both instances, however, the MMPA's rulemaking power was used in conjunction with other legal authorities. Moreover, both sets of regulations were established to prevent takes from occurring, not to protect habitat itself. In the November 1993 incidental take regulations for the Beaufort Sea and adjacent coast, FWS suggests that there is authority to implement the Polar Bear Habitat Conservation Strategy, but the source of that authority is not identified.[352]

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[351] 16 U.S.C. § 1382(d).

TESTIMONY BEFORE THE HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES ON THE REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT

by

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on behalf of

THE BERING SEA COALITION

and

THE CITY OF ST. PAUL, ALASKA

February 10, 1994

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I. INTRODUCTION

Thank you for this opportunity to present testimony on the reauthorization of the Marine Mammal Protection Act. My name is Ilarion Merculieff and I am the Manager for the City of St. Paul in Alaska's Pribilof Islands, as well as coordinator for the Bering Sea Coalition.

St. Paul Island is one of the Pribilof Islands located in the eastern Bering Sea. It is the home for approximately 750 residents, most of whom are Aleuts. Since time immemorial, Aleuts have depended upon the bounty of the sea for their sustenance, livelihood, and culture. As a result of its location, St. Paul Island is at the center of one of the world's most biologically productive marine environments. This region is the home for many species of marine mammals, sea birds, and commercially valuable fish and shellfish. These biological resources are the foundation of the subsistence economy and culture of the residents of the Pribilof Islands and the Bering Sea coastal region. They are also the foundation of a commercial fishery that contributes at least ten percent of the world's fishery production. These fisheries are essential to the future of St. Paul and many other Bering Sea coastal communities. The future economic growth and stability of St. Paul, like many other Bering Sea

communities, is inextricably linked with the long-term viability of a successful commercial fishing industry and a healthy Bering Sea ecosystem.

The Bering Sea Coalition consists of 57 coastal communities in Alaska stretching from Nome to Atka. It was first formed in 1991 in an effort to bring together indigenous peoples with a common concern in issues related to the Bering Sea. The Coalition serves as: 1) an informal sharing network; 2) an organization that can be a force in decisionmaking processes and scientific fora; 3) an educational mechanism to inform others of the value of indigenous cultures in protecting and managing resources and teaching native spirituality; 4) a vehicle for obtaining research funding; 5) an organization to participate in research programs; and 6) an outreach effort to establish a link between Alaskan and Russian coastal communities for the purpose of developing cooperative efforts to protect shared cultural and natural resources.

The Bering Sea Coalition and the City of St. Paul are deeply concerned over the current population declines and ecosystem-wide ecological injury evident in the Bering Sea region. If the current trends persist, the subsistence and cultural patterns that have occurred for centuries in the towns and villages along the Bering Sea will be threatened, as will the economic base that holds the key to the future well-

being of these communities. And, just as these communities will suffer if this emerging ecological crisis is not abated, so will the other economic and environmental interests that benefit from the resources of the Bering Sea. A resource of national and international significance is at stake, and immediate action is imperative.

Throughout the 1700's and 1800's, the marine mammal resources of the Bering Sea served as the basis for a thriving trade in pelts and other byproducts. Largely unregulated trade in these marine mammal products lead to the near extinction of several species. As a result, much of the fur trade and the economic wealth it produced was brought to an end in the early 1900's.

Today, the resources of the Bering Sea are again providing for flourishing economic activities, including a large-scale commercial fishing industry and a growing tourist industry. These resources also are essential for subsistence purposes for Alaskan Natives. The Bering Sea resources that support this economic development and subsistence use are beginning to show severe signs of stress, once again posing the possibility that unwise use of the natural resources of this region will, as with the fur trade, cause thriving economic opportunity to decline or come to an end and diminish the availability of subsistence resources.

Since the mid-1970s, Bering Sea populations of Northern fur seals, Steller sea lions, harbor seals, and several species of fish-eating seabirds and sea ducks have all experienced substantial, unexplained declines in their number indicative of an ecosystem-wide injury. The Steller sea lion, now classified as a threatened species under the Endangered Species Act ("ESA"),[1] has declined from more than 100,000 animals in the 1970s to only 35,000 today. Since the late 1950s, the number of Northern fur seals has been reduced from about 1.8 million to about half that amount, and the species is now classified as depleted under the MMPA.[2] The Bering Sea/Gulf of Alaska harbor seal population is also experiencing a dramatic decline, and ESA listing may be forthcoming. Seabird populations have also been impacted, with some colonies of murres and kittiwakes reduced by as much as fifty percent in the period from 1976 to 1991. Spectacled eiders, a large-bodied sea duck, have also declined drastically since the 1960s and are listed as threatened. The wintering area of Spectacled eiders is not know but is probably in the Bering Sea near the ice edge. Heavy metal contaminants are also beginning to appear in substantial levels in walrus meat and other marine wildlife, raising concerns that marine pollution is affecting the health not only of living marine resources

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[1] 50 C.F.R. § 17.11.

[2] 50 C.F.R. § 216.15(c).

but also residents of coastal communities who consume walrus meat for subsistence purposes. The Bering Sea ecosystem also involves complex international issues related to shared fish and wildlife populations with Russia and the international fisheries in the Bering Sea.

In addition to the adverse impact that improper management of the Bering Sea can have on the resources of the region, the threat of legal restrictions imposed under the ESA and other laws to protect affected species is already becoming a reality in the Bering Sea region, producing controversy and resulting in restrictions on resource utilization activities. For example, the listing of the Steller sea lion under the ESA has resulted in restrictions on commercial fishing activities. If additional regulatory measures become necessary to protect the declining marine resources of this region, the Bering Sea may eventually become as embroiled in the conflict between species protection and natural resource utilization as is presently being experienced by the Pacific Northwest as a result of legal measures undertaken or contemplated to conserve the northern spotted owl, the marbled murrelet, and several salmon species.

Other marine ecosystems manifest problems similar to those evident in the Bering Sea. Most of the problems being experienced in the Bering Sea are also occurring in the Gulf of Alaska. Off the coast of New England, numerous fisheries

resources of the Georges Banks region are in serious decline. In the Chesapeake Bay, waterfowl and numerous commercially valuable fish and shellfish species are showing significant population declines. The Caribbean Sea, which produces fishery resources important to United States, is experiencing system-wide degradation. Similar problems are occurring elsewhere in the world in marine ecosystem areas for which the United States has important economic and environmental interests and international agreement obligations.

The problem shared in all of these regions is that resources are declining on a system-wide basis. The result is that species and population stocks that are of considerable commercial, ecological, subsistence, and aesthetic value are reaching a point where legal restrictions may be, or are already, necessary in an effort to halt or reverse the declines. These restrictions can apply not only to the species in need of protection, but also to the use of other resources that have a spatial or ecological relationship to the adversely affected species. For example, fishing operations that impact the food web of marine ecosystems may have to be curtailed under the ESA or other laws to protect other depleted fishery resources, marine mammals, marine birds, sea turtles, or other marine wildlife species. By focusing on marine ecosystem-based research and management and following a proactive approach to identifying ecosystem-based

problems and responding to them before they become severe, it may be possible to avoid the need to resort to such costly, controversial, and after-the-fact regulatory programs.

In this proposal, the Bering Sea Coalition and the City of St. Paul, Alaska, seek an amendment to the Marine Mammal Protection Act ("MMPA") to provide the basis for eventually establishing comprehensive, ecosystem-based protection and management of living marine resources. The MMPA is the ideal vehicle for such an amendment in that its primary objective is to ensure the "health and stability" of the marine ecosystems of which marine mammals are a part.[3] Although the MMPA establishes this policy, it provides few of the tools necessary to achieve this goal. The MMPA also recognizes the importance of marine mammals and a healthy marine ecosystem to the subsistence and economic needs of Alaskan Natives.[4]

While living marine resources continue to be managed or protected separately under a variety of laws, such as the MMPA, the Magnuson Fishery Conservation and Management Act ("Magnuson Act"), the Migratory Bird Treaty Act, and the ESA, there is no single law that provides for addressing marine ecosystem issues on a comprehensive basis. As demonstrated by the current biological problems being experienced in a number

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[3] 16 U.S.C. § 1362(6).

[4] Id. §§ 1371(b), 1402(b)(7).

of marine ecosystems, it is clear that the species-specific emphasis of these laws has failed to identify and respond to ecosystem-based protection and management needs.

The proposal calls for an amendment to the research requirements of the MMPA. Under the first part of the proposed amendment, the Secretaries of the Interior and Commerce, in consultation with the Marine Mammal Commission, would contract with the National Academy of Sciences to prepare a report to Congress on the need for marine ecosystem protection and management. This report would: 1) assess the status of the health and stability of large marine ecosystems consisting in whole or part of waters subject to the jurisdiction of the United States or for which the United States has international treaty obligations, and identify those ecosystems that are experiencing system-wide injury; 2) analyze the effectiveness of existing research, management, and conservation tools to address these problems; and 3) identify the additional actions needed to address the identified problems. A special process would be established to utilize Alaska Native organizations and traditional Native local knowledge in this research, including research on the use of marine ecosystem resources for subsistence purposes.

The second element of the amendment would authorize research specifically directed at marine ecosystem problems and protection needs in the Bering Sea. This research would

be conducted by the Secretaries of the Interior and Commerce, in consultation the Marine Mammal Commission. It would be undertaken with assistance from affected interest groups, including Alaskan Natives and coastal communities located on the Bering Sea. Research on subsistence issues would be conducted, on request, under contract with qualified Alaska Native organizations. The goal of this research would be to obtain baseline data on Bering Sea resources, establish long-term monitoring programs, and investigate the causes of and potential solutions to the species declines already documented in this region. Specific attention would be provided to marine mammal and marine bird populations, and fish and shellfish stocks. This research would be undertaken in locations in Alaska where researchers will have access to the ecosystem studied, and where the affected environmental systems can be monitored.

This proposal advances a national and international agenda. As Secretary Babbitt has declared in his proposal to establish the National Biological Survey, it is essential to establish "an anticipatory, proactive biological science program to enable land and resource managers to develop comprehensive ecosystem management strategies to minimize conflicts, litigation, and economic costs."[5]

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[5]Press Release, Department of the Interior, 3 (Apr. 8, 1993).

Congressman Don Young has recognized the need for developing adequate biological information on marine ecosystem issues:

> [A] lot of what is made decision wise is made without any real factual biological base. If there is anything we can do [it] is to get more of a network of scientists to understand this problem, out my mouth it sounds very strange, the ecosystem. But unfortunately we base a lot of our decisions on our individual [area], maybe longliners, purse seiners or gillnetters or whatever it is, without any real knowledge.[6]

With regard to the Bering Sea, President Clinton recently noted:

> The Bering Sea, off the coast of Alaska, is one the Earth's most biologically productive marine ecosystems. Its fish and shellfish provide 10 percent of the world's commercial catch and feed many of the people of Asia and North America. To ensure that these and all other natural resources will be available for our descendants, we must carefully manage this richly endowed region. The difficult task of protecting the pollution-sensitive Arctic relies on careful scientific monitoring and . . . international cooperation.[7]

It is in this vein that the proposal set forth by the City and Coalition carries these themes forward.

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[6] Magnuson Fishery Conservation and Management Act Reauthorization-Part II: Hearings on Reauthorization of the Magnuson Fishery Conservation and Management Act to Ensure the Survival of Our Fishing Industry and Our Coastal Communities Before the House Comm. on Merchant Marine and Fisheries, 103rd Cong., 1st Sess. 45 (1993) (statement of Rep. Don Young, U.S. Rep. from Alaska, and ranking minority member, House Subcomm. on Fisheries Management).

[7] Letter from President Clinton to the International Symposium on the Ecological Effects of Arctic Airborne Contaminants (September 27, 1993).

II. BACKGROUND ON THE ECOSYSTEM HEALTH AND STABILITY GOAL OF THE MMPA

A. REFERENCES TO ECOSYSTEM PROTECTION IN THE TEXT OF THE MMPA

In 1972, landmark legislation -- the MMPA -- was enacted to protect marine mammals from the direct and indirect effects of human activities. The MMPA seeks to accomplish this result through its moratorium on all forms of "taking" (i.e., harassing, hunting, capturing, or killing) marine mammals, subject to limited exceptions.[8] The goal of the moratorium, and the research and management programs authorized by the MMPA, is to ensure that marine mammal species and population stocks are not permitted to: 1) "diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part," and 2) "consistent with this major objective, [that] they should not be permitted to diminish below their optimum sustainable population."[9]

Although these goals serve as the basis for administration of marine mammal programs under the Secretaries of Commerce and the Interior, they are actually the MMPA's secondary objectives. When it passed the MMPA, Congress recognized the pre-eminent need to ensure the long-term health of the marine environment as a whole. Throughout the

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[8] 16 U.S.C. § 1371.

[9] Id. § 1361(2).

deliberations leading up to passage of the Act, members of Congress, federal and state officials, scientists, and members of the public expressed concern with the overall health of the marine environment and its living marine resources. Concerns regarding pollution, habitat degradation, over-exploitation of fisheries and other living marine resources, as well as the desire to reduce the direct and incidental take of marine mammals, motivated Congress to pass the MMPA.

In recognition that marine mammals are but one part of marine ecosystems and that such ecosystems were, even in 1972, in a serious and rapid state of decline, Congress established as the primary goal of the MMPA the management of marine mammals "to maintain the health and stability of the marine ecosystem."[10] In declaring this policy objective, however, Congress did not provide any specific authority to advance this primary goal. For example, no direct authority exists under the statute to protect marine mammal habitat or components of such habitat, including prey species. No research programs are expressly authorized to address marine ecosystem health and stability issues or the relationship between marine mammals and other elements of the marine environment. Perhaps most importantly, no tools are provided to manage marine ecosystems on a comprehensive basis,

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[10] Id. § 1361(6).

recognizing the inter-related nature of all resources of the marine environment and the role that marine mammals play in the dynamics of each such ecosystem. As a result, the "primary" Congressional objective of the MMPA has, in many respects, become the MMPA's "forgotten" objective.

The MMPA makes frequent, although only general, reference to ecosystem protection. The text of the law establishes that Congress intended to make marine ecosystem health and stability its over-arching policy goal, as well as an essential element of MMPA research and management initiatives. For all of this attention to marine ecosystem protection, however, the Act gives little impetus to actions designed to carry out that goal.

Section 2 of the Act, which recites findings and declarations of policy, contains several references to the importance of protecting the environment of which marine mammals are a part. Section 2(2) provides that "[certain] species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part."[11] Congress also found, in section 2(5)(B) that "marine mammals and marine mammal products . . . affect the balance of marine ecosystems in a manner which is important to

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[11] Id. § 1361(2).

other animals and animal products which move in interstate commerce."[12] Section 2(6) sets forth the MMPA's foremost objective by stating that "it is the sense of the Congress that [marine mammals] should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem."[13]

Section 3 also incorporates ecosystem protection. The MMPA defines "Optimum Sustainable Population" ("OSP"), for example, as "the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element."[14]

The Secretaries of the Interior and Commerce may, under the MMPA, authorize takings incidental to certain activities. The appropriate Secretary may also authorize directed takings. When requested to do so by individuals who participate in an activity other than commercial fishing, the appropriate Secretary may permit incidental takings of small numbers of marine mammals if they are controlled by regulations "setting

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[12] Id. § 1361(5)(B).

[13] Id. § 1361(6) (emphasis added).

[14] Id. § 1362(9).

forth . . . permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat."[15] Similarly, the Secretary may issue a general taking or importation permit, provided that in issuing the regulations governing such a situation, "the Secretary shall give full consideration to . . . the marine ecosystem and related environmental considerations."[16]

In the context of international agreements, the Act emphasizes the importance of protecting regions as opposed to individual animals. The MMPA encourages the Secretaries, working through the Secretary of State, to "seek . . . agreements to promote the purposes of this act with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of marine mammals."[17]

Finally, in a recent addition to the MMPA, the "Marine Mammal Health and Stranding Response Act," Congress focused attention on the impacts pollutants in the marine environment are having on the health of marine mammals. One purpose of the program established by this Act is to "correlate the

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[15] Id. § 1371(a)(5)(ii)(I).

[16] Id. § 1373(b)(3).

[17] Id. § 1378(a)(3).

health of marine mammals and marine mammal populations, in the wild, with available data on physical, chemical, and biological environmental parameters."[18] This amendment, passed partly in response to die-offs of bottlenose dolphins on the East Coast in the late 1980's, constitutes legislative recognition of the dependence of the health of marine mammals on the health of their environment.

As these statutory references demonstrate, Congress frequently recognized the relationship between marine mammal protection initiatives and the health and stability of the marine environment. Nowhere is the MMPA, however, is the federal government authorized or directed to take action expressly for the purpose of protecting the marine ecosystem. The significance of this lack of authority becomes even more apparent when the legislative intent underlying the MMPA is taken into account.

B. LEGISLATIVE HISTORY REFERENCES TO ECOSYSTEM PROTECTION

The references to ecosystem protection in the text of the MMPA are the outgrowth of extensive discussion about environmental problems plaguing the marine environment voiced throughout the debate on the original MMPA and its reauthorizations. Indeed, these legislative history

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[18] 16 U.S.C.A. § 1421(b)(2) (West Supp. 1993).

statements reveal a much broader concern with marine ecosystem issues than is reflected in the current statutory text.

General references to the need for ecosystem protection are found throughout the MMPA legislative history. In 1972, the Senate Commerce Committee considering the MMPA wrote, "[b]asic life history and population information ought to be obtained for each marine mammal of concern to the United States. . . . All of these animals are a part of the ocean biomass and are important in maintaining an ecological balance."[19] Six years later, the House Report accompanying reauthorization legislation stressed the importance of the research that had been carried out to that point:

> This expanded knowledge has enabled us to better assess the impact of various ocean-related development activities on marine mammals. An understanding of these impacts and of the relationship of marine mammals to their ecosystem permits the development of programs to ensure that these species remain a functioning part of their ecosystem.[20]

In the section-by-section analysis of the original Senate bill in 1971, the report authors noted that the finding regarding the importance of marine mammals as functioning parts of their ecosystems included in the Act was meant to emphasize "the need to protect those geographic areas of

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[19]S. Rep. No. 863, 92d Cong., 2d Sess. 10 (1972).

[20]H.R. Rep. No. 1028, 95th Cong., 2d Sess. 5 (1978).

significance for each species of marine mammals from adverse activities."[21]

In a letter to the Department of State, Congressman Dingell stressed this theme by stating:

> The disappearance or low population levels of certain species of marine mammals would clearly have implications for the ecosystems of which these mammals have been a significant part. Also, the level of pollution of the world's oceans will unquestionably have some effect upon them which might well be to increase the environmental stress limiting their growth and survival rates.[22]

The State Department replied:

> [T]he disappearance or serious reduction in the population levels of marine mammals can affect the stability and viability of marine ecosystems which in turn can lead to a more generalized disruption of the marine environmental balance. If we are to preserve the oceans, and if their resources are to be preserved for mankind, programs must be developed that view the oceans and their flora and fauna as a totality . . . .[23]

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[21]S. Rep. No. 863, 92d Cong., 2d Sess. 11 (1972).

[22]Letter from John Dingell, Chairman of the House Subcommittee on Fisheries and Wildlife Conservation, to Christian Herter, Special Assistant to the Secretary of State for Environmental Affairs (August 17, 1971), reprinted in Marine Mammals: Hearings on H.R. 10420, et al., Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 92d Cong., 1st Sess. 200 (1971) [hereinafter House Hearings].

[23]Letter from Harrison M. Symms, Acting Assistant Secretary of State for Congressional Relations, to John Dingell, Chairman of the House Subcommittee on Fisheries and Wildlife Conservation (not dated), reprinted in House Hearings at 200-201.

These general themes were repeated in individual discussions pertaining to the relationship between marine mammal optimum sustainable population levels, the general impact of human activities on the marine environment, and the consequences of pollution on the health and stability of the marine environment.

The legislative history of the Act demonstrates that when Congress chose to seek the "Optimum Sustainable Population" ("OSP") of marine mammals, it was responding to testimony regarding the importance of considering the animals part of a larger ecosystem. Dr. G. Carleton Ray of the Marine Mammal Council suggested Congress use ecosystems to define OSP. As he stated before the House Subcommittee on Fisheries and Wildlife Conservation:

> The concept of "sustainable yield" is important and it is clear that such a yield must not be calculated merely in economic terms . . . what is "optimum" from the point of view of economic yield may not be optimum in terms of a species or population in its environment. A part of the difficulty in management practice is that it has been in terms of human needs, rather than in terms of the needs of ecological balance within a natural ecosystem.[24]

Dr. Ray continued, "[w]hen we are speaking of just plain scientific fact and biology you cannot always protect an animal by protecting the animal. You have to protect this

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[24]House Hearings at 401-02.

habitat and you will protect the animal."[25] In response to a later written request for a distinction between "sustainable yield" and "optimum yield," the panel which included Dr. Ray responded:

> "Optimum" may be defined according to various criteria. The economic view might be the maximum number of the most salable animals that can be taken without causing decline. Biologically, the optimum yield might be less because the wildlife manager felt that some surplus animals were necessary for population or ecosystem health.[26]

A representative of the Department of the Interior also emphasized the need to consider marine mammals as part of a larger dynamic in defining OSP. Joseph P. Linduska, Associate Director of the Bureau of Sport Fisheries and Wildlife, stated: "Populations of wild creatures are not and cannot be isolated from other elements of the environment under the assumption that such isolation will insure their continued existence. On the contrary, wild animal populations are living, dynamic entities which act and react with each other and with their environment. . . ."[27]

In the Senate debates, Senator Stevens noted that in defining OSP, "[t]he well-being of the entire ecosystem must

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[25] Id. at 416.

[26] Id. at 438-39.

[27] Id. at 152.

therefore be kept in mind. It also requires a judgment, not only on the maximum population of the species, but on the maximum total productivity of the environment including all constituent elements."[28]

Numerous witnesses also emphasized the importance of continued management to the health of ecosystems in light of existing human interference. Thomas L. Kimball, then Executive Director of the National Wildlife Federation, expressed this position with exceptional emphasis.

> Modern man . . . has so disrupted our planet and ecology, poisoned and polluted the environment, that the only hope for much of the world's wildlife is for man to utilize his great powers of reason, science, technology, and persuasion to overcome or minimize the adverse impact of his own intrusion into the plant and animal ecosystem.[29]

Dr. G. Carleton Ray wrote to the Senate subcommittee, "[i]t must be apparent that man has already perturbed all of the earth's ecosystems and it is now our clear duty, as conservationists, to protect the future health of these ecosystems by managing them wisely at an international level."[30] In his oral testimony before the House, Dr. Ray

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[28]118 Cong. Rec. 25,258 (1972).

[29]House Hearings, at 75.

[30]Ocean Mammal Protection: Hearings on S. 685, et al., Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce, 92d Cong., 2d Sess. 836 (1972) [hereinafter Senate Hearings].

noted that "no ecosystem on earth has escaped the hand of man. We have already intervened, and often deeply, in systems involving marine mammals. Therefore, we must manage, if only to assume [sic] that this intervention is kept in control."[31]

Congressman Dingell also advocated protecting marine ecosystems. "The controlling issue in the controversy between these two views must necessarily be what is best for the animals themselves and for the ecosystems upon which they, and possibly we, depend."[32]

Witnesses discussing the management approach that should be employed under the MMPA also referred to the need for a comprehensive, ecosystem-based program. As Dr. Kenneth Norris of the Marine Mammal Council testified before the Senate subcommittee:

> The management should be based not only upon the biological health of the individual species, but upon the health of the ecosystem of which it is a part. . . . Such management must be based upon continuing reappraisal of the health of both animal and ecosystem. . . . Enlightened management today is no longer species management, it is instead ecosystem management.[33]

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[31]House Hearings, at 402.

[32]118 Cong. Rec. 7685 (1972).

[33]Senate Hearings, at 359-60.

Howard Pollack, then Deputy Administrator of the National Oceanic and Atmospheric Administration, expressed a similar sentiment when he testified that "any conservation program for a particular species must not only include studies of that species, but also other organisms which interact with that species in the marine environment, and indeed the environment itself."[34]

Another government witness, Dr. Lee Talbot of the Council on Environmental Quality, drew a careful distinction between management for human versus ecological purposes. As he explained:

> [I]t is possible to manage a wild species for a maximum sustained yield under conditions which may alter or make less stable other parts of the environment. Therefore, the maximum sustained yield in some cases may not be necessarily the yield level at which the optimum environmental balance . . . may be maintained. . . . the objective of management, as we see it, should not be purely economic gain . . . but environmental balance and economic gain consistent with that.[35]

In 1988, the MMPA was amended to require the preparation of conservation plans for depleted marine mammals.[36] In doing so, Congress emphasized in the legislative history the need for an evaluation of the relationship between the species or

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[34]Senate Hearings, at 426.

[35]Id. at 146-47.

[36]See 16 U.S.C.A. § 1383(b).

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stock and the ecosystem of which it is a part. Thus, the conservation plans were to include: "(1) an assessment of the status of the species or stock and its essential habitat; (2) a description of the nature, magnitude, and causes of any population declines or loss of essential habitat; (3) an assessment of existing and possible threats to the species and its habitat," among other things.[37] Similarly, the legislative history on the section of the Act granting the Secretaries the power to grant permits to take marine mammals recognized that such permits were more likely to be necessary along the coast of Alaska given the large numbers of marine mammals there and directed the Secretaries to "work closely with the State of Alaska and affected user groups, especially Alaskan Natives, to develop effective conservation programs for marine mammals. These could include assessments of populations and their fluctuations, essential habitat, threats to species and habitat, and research and management needs."[38]

In many cases, concern for protecting the health of the ecosystems that include marine mammals took the form of statements regarding the impacts of pollution. Witnesses and Members commented on the need for future study and noted that

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[37]S. Rep. No. 592, 100th Cong., 2d Sess. 24 (1988).

[38]H.R. Rep. No. 970, 100th Cong., 2d Sess. 28 (1988).

the taking of marine mammals by humans is only one of many causes of the decline of species and population stocks.

Richard Denney, wildlife consultant for the American Humane Association, discussed a variety of threats to fur seals, including ocean debris, in his testimony. At the close of his opening statement, he noted: "[i]t has been intimated that the oceans are already the worst enemies of marine mammals, causing the death of thousands from pollution. If this is true, no amount of total protection will 'save' them - the primary objective should be international abatement of habitat degradation."[39] As Senator Hollings replied:

> That is the point, isn't it, Mr. Denney, that you take into account the entire ecosystem? The pollution caused to walrus and sea otter and other species from cadmium, mercury, DDT and all the other things that go into the ecology [sic] computer? . . . Why not use that reverse approach? Don't lift off a moratorium until techniques develop and demonstrate to the Congress that a meaningful and persuasive case can be made to have open season again![40]

The Director of Environmental Affairs for the Isaak Walton League, Ted Pankowski, similarly stressed the interconnected causes of marine mammal decline and ecosystem impacts in his testimony before the House subcommittee.

> [A] total ban on the taking of animals is no guarantee that a species will survive or do

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[39]Senate Hearings, at 522.

[40]Senate Hearings, at 522-23.

> well. Because of other, more critical factors, it may only hasten that unhappy day. The committee knows them well -- the destruction of habitats, the poisoning of environments, manipulation of resources that upset natural balances, over killing . . . an effective marine mammals bill must take all of these into account.[41]

Mr. Pankowski stated further: "[w]e must realize that if the marine environment is permitted to deteriorate to a critical point, whether or not marine mammals are deliberately killed may become academic."[42]

Reflecting these concerns, the report accompanying the 1971 House bill that became the MMPA noted the threats to marine mammals from ocean dumping, pesticides, heavy metals, reduced levels of herring for food, and high speed boats. The report summarized: "[m]an's taking alone, without these factors, might be tolerated by animal species or populations, but in conjunction with them, it could well prove to be the proverbial straw added to the camel's back."[43]

In this manner, Members of Congress, government officials and representatives of concerned interest groups expressed the common view that successful marine mammal protection required ecosystem protection as well. Now, more than 20 years later,

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[41]House Hearings, at 516.

[42]Id. at 520.

[43]H.R. Rep. No. 707, 92d Cong., 1st Sess. 15 (1971).

the accuracy of this assessment is becoming increasingly apparent. Unfortunately, the tools needed to react to ecosystem-based problems are lacking.

III. CONCERN OVER MARINE ECOSYSTEM DEGRADATION EXPRESSED UNDER OTHER LAWS

Although the MMPA provides one of the strongest statements of policy in favor of marine ecosystem protection, concern has also been expressed under other United States laws and international agreements for the health of the marine ecosystems, in general, and the Bering Sea, in particular. Alaska Natives have for many years been calling attention to the need for ecosystem-based research and management in the Bering Sea.

For example, residents of the Pribilof Islands have been concerned over the health of the Bering Sea ecosystem since the mid-1970s. At that time, the thinning of fur seal pelts became apparent, which gave rise to concern over the possibility of pollution impacts or food stress affecting the herd and other components of the Bering Sea ecosystem. Representatives of the Pribilofs began working with academic institutions and government agencies to assess ecosystem health and stability. In general, government agencies did not heed these concerns that widespread changes were occurring in the Bering Sea that required detailed research.

Concerns over the health and stability of the marine environment and the Bering Sea ecosystem were expressed repeatedly during deliberations over the Protocol to extend the International Convention on the Conservation of the North Pacific Fur Seal (the "Convention") in the 1980's. The one issue that both opponents and proponents of the Protocol agreed upon was the need for an ecosystem-based approach to protecting and managing the resources of the Bering Sea and the North Pacific Ocean.

In 1981, Alaska Governor Hammond testified on Senate ratification of the 1980 Protocol to extend the Convention by highlighting the need to retreat from single-species management approaches. As he stated:

> The issue which is brought to the fore is whether we are in fact attempting to achieve a systems management approach (as is desirable), including maintenance of healthy populations of those components affected by man, or whether we are pursuing mutually exclusive goals for different species or groups which will eventually have undesirable yet unnecessary consequences. At present we are unfortunately working toward the latter, at least in the North Pacific and Bering Sea regions.[44]

This concern was echoed in testimony submitted by the Villages of St. George and St. Paul, where it was stated, "[i]n light of our experience it would be unwise to ignore the

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[44]North Pacific Fur Seals: Hearing Before the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. 55 (1981).

fact that the ecosystem in the Bering Sea must be managed as a whole."[45]

Environmental organizations voiced similar concerns. For example, the Center for Environmental Education (now the Center for Marine Conservation) emphasized that marine ecosystem health and stability is the primary goal of the MMPA. The Center called attention to the numerous problems that result from the failure to fulfill this goal and manage marine ecosystems from a multi-species perspective:

> With single species management, attention is focused on the dynamics of particular species or stocks without explicit regard to the interactions between those species or stocks and other components of the ecosystem;
>
> Single species management depends on a degree of stability and resilience of the resource that may not exist;
>
> Attention is focused on the output from resource use, without regard to the input of energy, of other natural resources, and of human skill and labor required to secure the output;
>
> Single species management may admit, and even encourage, overexploitation.
>
> The greatest problem facing policy makers is that presently we have insufficient information about the numerical and functional relationships between species. Diligent acquisition of such information is of utmost importance if we are ever to be able to make conscientious resource management decisions. We must be able to predict the effects of proposed management strategies, recognizing

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[45] Id. at 37.

> that sometimes these careful predictions may be askew. Successful monitoring programs which afford early detection of changes relevant to management strategies are ultimately highly cost effective. These programs allow us to avoid costly crisis oriented management.[46]

The National Audobon Society expressed the same concern. Elvis Stahr testified for the Society that:

> There is a most serious need to provide greater long-term protection to the marine environment of the Bering Sea and to the nationally and internationally significant marine bird colonies on the Pribilof Islands. A first step has been the inclusion of critical portions of the Pribilofs in the Alaska Maritime National Wildlife Refuge created by the Alaska National Interest Lands Conservation Act of 1980.
>
> We urge your Committee to explore ways in which existing international agreements can be strengthened, and new agreement forged with Pacific rim countries, to better protect marine waters of the Bering Sea from dangerous pollution and overutilization of resources, particularly fish on which marine birds and mammals rely for sustenance.[47]

These concerns were ultimately reflected in the Proclamation signed by the President in support of the 1980 Protocol. President Reagan specified in the 1981 Proclamation that studies were required on the relationship between the size of the fur seal harvest and health of the Bering Sea ecosystem and that the impact of alternative forms of

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[46] Id. at 60.

[47] Id. at 59.

employment for the Aleuts on the fur seal herd and the Bering Sea ecosystem.[48]

These themes were repeated in 1985 during hearings on ratification of the Protocol to extend the Interim Convention on the Conservation of the North Pacific Fur Seal. Larry Merculieff, then President of the Tanadgusix Corporation, expressed strong concern over the disjointed and species-specific approach to marine resources management in the Bering Sea and elsewhere. Sounding a theme that is now widely accepted by scientists and resource managers, Mr. Merculieff called for a more comprehensive approach to protecting marine mammals and managing marine resources. Noting the population distress being experienced by fur seals, sea lions, and two Bering Sea bird species, he called for an ecosystem-based approach for managing the Bering Sea. Mr. Merculieff explained that "[s]cientists from all disciplines, including seal scientists, agree unanimously that this approach is essential for rational resource management, but all are frustrated by the inherent problems."[49] As it was further stated:

> We . . . find it disconcerting that scientists from the different disciplines . . . and from

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[48]Presidential Proclamation (Oct. 14, 1981), 32 UST S881, S882.

[49]North Pacific Fur Seal Treaty: Hearings on Treaty Doc. 990-5 Before the Senate Comm. on Foreign Relations, 99th Cong., 1st Sess. 257 (1985) (statement of L. Merculieff).

> different bureaucracies are not coordinating or synthesizing data on the species related in food webs in the Bering Sea. Apparently this is systemic and not atypical of many scientific research programs.[50]

Speaking specifically to the problem of fur seal, sea lion, and seabird population declines in the Bering Sea, Mr. Merculieff noted the link between these species and their reliance on pollock as a part of the food web upon which they were dependent was noted. The testimony called for the establishment of a research program that would study the marine ecosystem as whole.[51] This view also drew support from the environmental community,[52] but no action was taken.

The importance of ecosystem-based research, management and protection initiatives also has been addressed under the Magnuson Act. Like the MMPA, the Magnuson Act includes a statutory requirement directed at marine ecosystem concerns. The Magnuson Act seeks to subject fisheries to "sound management . . . so as to provide optimum yields on a continuing basis."[53] The term "optimum" is defined as "the amount of fish . . . which is prescribed . . . on the basis of

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[50] Id. at 251.

[51] Id.

[52] Id. at 211 (statement of David R. Cline, National Audobon Society), 256 (statement of E. V. Curtis Bohlen, World Wildlife Fund).

[53] 16 U.S.C. § 1801(a)(5).

the maximum sustainable yield . . . as modified by any relevant economic, social, or ecological factor."[54] The reference to an "ecological factor" in the Magnuson Act is clearly intended to require modifications to maximum sustainable yield fishery levels when necessary to ensure that fishing levels will not disrupt the balance of marine ecosystems, such as by over-fishing prey species for marine mammals and seabirds.

In 1989, the demand for comprehensive multi-species-oriented management of marine resources was taken up by 41 of the world's leading marine biologists in testimony submitted under the Magnuson Act. The scientists noted that marine ecosystems are complex and subject to naturally occurring changes in their constituent elements. However, human interventions "can and do have stabilizing or destabilizing influences on the natural variability and cause or accelerate severe shifts in the composite ecosystem."[55] They noted the severe destabilizing impacts of these interventions in several fisheries around the world. To address this problem, the scientists called for, among actions, amendments to the Magnuson Act "to promote a total ecosystem perspective in managing the Nation's fish stocks, taking into account the

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[54] Id. § 1802(1) (emphasis added).

[55] Statement of Concerned Scientists on the Reauthorization of the Magnuson Fishery Conservation and Management Act 3 (1989).

protection of essential habitat, including the habitats essential to early life histories, and consideration of marine species neither harvested nor conserved."[56]

Recognizing the need to address predator-prey relationships and other ecological factors in setting fishery harvest levels under the Magnuson Act, the Marine Mammal Commission in a 1990 report to the Secretary of Commerce on the marine mammal incidental take program under the MMPA recommended that decision-making under the Magnuson Act follow a more comprehensive, ecosystem-based approach. As the Commission stated:

> The reference to "ecological factor" in the definition of "optimum yield" is interpreted by the Marine Mammal Commission to mean that, to collectively give effect to the Marine Mammal Protection Act and the Magnuson Fishery Conservation and Management Act, the Fishery Management Councils and the National Marine Fisheries Service must insure that estimates of optimal fishéry yields take into account food requirements (and uncertainties related thereto) of marine mammals and define "overfishing" to include any fishery-related reductions in fish or shellfish stocks that would result in reduction of marine mammal populations below their maximum net productivity level calculated with respect to abundance prior to fishery development.[57]

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[56] Id. at 4.

[57] Marine Mammal Commission, Recommended Guidelines to Govern the Incidental Taking of Marine Mammals in the Course of Commercial Fishery Operations After October 1993, (July 1990).

To address this concern, the Commission recommended that Magnuson Act regulations be developed to require the relationship between fisheries yields and marine mammal food requirements be taken in account in setting commercial fishing catch limits. This action has not been taken.

In recent months, Alaska Natives have once again called for Congressional action under the Magnuson Act to foster ecosystem-based research and management and to prevent fishing from occurring at levels that deplete other resources. As stated in testimony before the House Merchant Marine and Fisheries Committee that: "[c]onventional wisdom is telling everyone that the [pollock] fishery is healthy in the Bering Sea but . . . fourteen key species are in decline, at least six of which are in the pollock food web."[58] These systemic indicators are ignored at the peril of those dependent on the ecosystem, and its was recommended that the species-specific approach to management under the Magnuson Act give way to a more progressive ecosystem management regime.[59]

Similar testimony was submitted before the Senate Commerce Committee that "[e]cosystem approaches to research

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[58] Hearing on Reauthorization of the Magnuson Fishery Conservation and Management Act before the House Subcommittee on Fisheries Management, House Committee on Merchant Marine and Fisheries, April 21, 1993 (testimony of Larry Merculieff).

[59] Id.

and management need to be pursued vigorously. Conventional approaches are not working. The Magnuson Act reauthorization must take into account the reality of the inter-relationships among the species and the ecosystem which those species live in."[60] Accordingly, he recommended that the Magnuson Act be amended "to ensure that the health of the ecosystem as a whole will allow a sustained biological diversity and thereby healthy communities and a healthy sustainable industry."[61]

IV. DECLINE OF THE BERING SEA ECOSYSTEM

Over the last 20 years, the Bering Sea ecosystem has undergone significant reductions in a number of its component species. During this time period, populations of Northern fur seals, Steller sea lions, harbor seals, and four species of fish-eating seabirds, (thick billed-murres, common murres, black-legged kittiwakes, and red-legged kittiwakes) have all experienced substantial, unexplained declines in their number, indicative of an ecosystem-wide injury. Several important Beringian waterfowl species, including Pacific brant geese, emperor geese, spectacled eider and Steller's eider have also undergone population declines that are not fully understood.

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[60] Hearing on Reauthorization of Magnuson Fisheries Conservation and Management Act before the Senate Subcommittee on Merchant Marine, Senate Committee on Commerce, Science and Transportation, June 30, 1993 (testimony of J. Anthony Smith).

[61] Id.

Presently, the cause or causes for these declines are not known; however, a list of potential causes includes entanglement in lost or discarded fishing gear, incidental take in driftnet, trawl, and other fisheries; decreased food availability due to overharvesting of pollock or other finfish; decreased food availability due to climate or other natural changes affecting the distribution, abundance, or productivity of important prey species; natural diseases; intentional shooting; and environmental pollution.[62] Regardless of the precise reason these changes are occurring, the fact remains that a major unexplained reduction in numbers of animals in the Bering Sea has taken place. Such reductions, left unchecked, may result in irreversible change in the structure and productivity of the entire ecosystem.

Traditionally, the Bering Sea has maintained a high level of biological productivity, supporting a substantial food web which includes up to 25 species of marine mammals, 32 species of seabirds, 30 species of waterfowl, and sizable populations of fish. In turn, this productivity has allowed the Bering Sea to play host to a number of commercial industries. Prior to 1900, economic attention centered around the acquisition of Northern fur seal and sea otter furs. Overhunting soon

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[62]Gordon L. Swartzman and Robert J. Hofman, Uncertainties and Research Needs Regarding the Bering Sea and Antarctic Marine Ecosystems 1 (Final Report for Marine Mammal Workshop Held December 12-13 1990).

depleted these animals, thus shifting the economic focus to fisheries. While initially salmon, herring, halibut and crab were the primary catch, within the past 30 years, pollock has become by far the most significant fishery in the Bering Sea.[63]

Since the mid-1970s, a number of the Bering Sea's populations of marine mammals, seabirds and waterfowl have suffered dramatic declines in their numbers. Of the marine mammals, Northern fur seals, Steller sea lions and harbor seals have all been greatly reduced in population size. The Steller sea lion, whose population size dropped from greater than 100,000 in the 1970s to a mere 35,000 today, is in such a state of decline that it is now listed as a threatened species under the Endangered Species Act, and it is a serious candidate for downlisting to endangered. In addition, the Northern fur seal has declined from a population of about 1.8 million in the 1950s to roughly half that figure today, thus qualifying as a depleted species under the MMPA.

In addition to marine mammals, seabirds and waterfowl of the Bering Sea have also suffered significant declines in their number. In the Pribilof Islands, recognized as home to the largest seabird colonies in the Bering Sea, and among the largest of the Northern hemisphere, some colonies of murres and kittiwakes may have declined by as much as fifty percent

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[63] Id. at 12.

in the period from 1976 to 1991.[64] In the past twenty years Pacific brant geese have declined approximately twenty percent and Bering Sea colonies have declined up to sixty percent.[65] Emperor geese rely on the Bering Sea throughout the year and their population has declined seventy percent in the past thirty years. Spectacled eiders and Steller's eiders may have declined up to ninety and fifty percent, respectively, in the past twenty years. Spectacled eiders are listed as threatened species under the Endangered Species Act and the Steller's eider is proposed for similar listing.

While a variety of explanations have been advanced to account for these radical declines in Bering Sea animal populations, none have proven wholly satisfactory.[66] As Russian scientist Alexander Golovkin has stated, "[i]n a balanced and dynamically stable environmental system, all components of the food web are interrelated and react keenly to changes in population dynamics of any of the participants."[67] Thus, regardless of the explanation, an

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[64]Alexander N. Golovkin, Colonial Seabirds of the Pribilof Islands 1, 7 (August 1991) (on file with the City of St. Paul).

[65]Letter from Christian P Dau, Wildlife Biologist, United States Department of the Interior, Izembek National Wildlife Refuge, to Larry Merculieff, Coordinator, The Bering Sea Coalition (October 26, 1993).

[66]See Swartzman and Hofman, supra, at 1-6.

[67]Golovkin, supra, at 16.

injury to any one part of the Bering Sea ecosystem will almost certainly impact the entire ecosystem.

In this mutually dependent relationship, removal of one component part necessarily effects all the other parts. Therefore, one theory that may help to explain the current problems in the Bering Sea points to the fantastic growth in the Bering Sea pollock fishery as being responsible for the recent marine mammal, marine bird and fish population declines. According to Dr. Golovkin, "[p]ollock presently constitute about 52% of the diet of Pribilof seabirds, about 85% of the total fish biomass of the region, and about 85% of the summer diet of fur seals."[68] Moreover, Golovkin calculates that the total combined consumption of pollock by birds and fur seals in the Pribilof region theoretically exceeds the average total biomass of edible pollock in the same region.[69]

Lacking a single, definitive explanation for the marked decline of these populations and in light of their demonstrated inter-reliance, the existing crisis can only be the result of, and result in, ecosystem-wide impacts. Therefore, in the face of causal uncertainty, all potential causes must be examined, and if needed, addressed through an ecosystem-wide approach.

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[68] Id. at 12.

[69] Id. at 15.

V. OTHER MARINE ECOSYSTEMS IN DECLINE

The Bering Sea is perhaps the most pressing example of a marine ecosystem currently in decline. Unfortunately, it is not the only example. The Gulf of Alaska is the home to numerous species of marine mammals and marine birds whose populations are experiencing declines or whose status remains uncertain. This region now shares many of the problems which are affecting the Bering Sea, and declines in both ecosystems are interrelated since the marine mammals and marine birds inhabit the Bering Sea and the Gulf of Alaska.

On the East Coast, the Chesapeake Bay, considered one of the world's most productive estuaries and home to several marine mammal species, is showing signs of disturbing declines in species such as submerged aquatic grasses, striped bass, shad, oysters, clams, waterfowl and a decrease in the overall Bay water quality.[70] Scientists have also become concerned over the decline in numbers of the once abundant Chesapeake Bay Blue Crab.[71] These contemporaneous, unexplained declines are indicative of an ecosystem-wide injury.

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[70]Chesapeake Bay Critical Area Commission, Critical Area and You: The Chesapeake's First Line of Defense 1 (Hugh M. Smith ed., n.p., n.d.).

[71]D'Vera Cohn, As Crab Yield Falls, Scientists Claw for Clues, Wash. Post, August 8, 1993 at A1, A18.

Also on the East Coast, several fish stocks have been severely depleted (herring, haddock, hake) as a result of overfishing in the Georges Bank marine ecosystem off the coast of New England. The effect of this overfishing is not fully understood, but it may be causing, or be the result of, systemic injury.[72]

On the West Coast, overexploitation of the Pacific sardine has led to a number of questions regarding ecosystem-wide impacts in the California Current region. It has been observed that "[r]emoval of a major component such as the Pacific sardine (unexploited biomass averaging about 3 million tons) from the California Current food web would presumably have measurable effects on other components of the ecosystem."[73] Notable in this context, concurrent with the crash of the Pacific sardine fishery, brown pelicans, which

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[72]In response to this depletion, the United States Department of Commerce ("DOC") has recently imposed an emergency rule prohibiting haddock fishing in certain areas of Georges Bank The DOC noted:

> [H]addock stocks on both Georges Bank and in the Gulf of Maine . . . are at all-time low levels of abundance. Adult stock biomass is lower now than at any point since the inception of stock assessments. Haddock landings in 1993, which reflect the stock condition, are expected to be the lowest in recorded history.

59 Fed. Reg. 26, 27 (January 3, 1994).

[73]Alec D. MacCall, Changes in the Biomass of the California Current Ecosystem, in Variability and Management of Large Marine Ecosystems 33, 40 (Kenneth Sherman and Lewis M Alexander eds., 1986).

rely upon sardines as a food source, began experiencing significant levels of reproductive failure.[74]

Additionally, recent events in the Caribbean Sea indicate that it too is suffering from an ecosystem-wide injury. These include "overfishing of reef resources, an epizootic of the spiny sea urchin . . ., widespread bleaching of corals, plus white band and black band diseases, fish kills, oil pollution, mining, land erosion associated with deforestation, and population declines of several species of sea turtle."[75] Moreover, an increase in the already substantial number of cruise ships, departing from a number of countries, but largely from the United States, will further stress the Caribbean ecosystem.[76]

From an international perspective, the recent United Nations conference on the depletion of fisheries worldwide has prompted scientists and other observers to reflect on the impact of fishing on other portions of the marine ecosystem. The United Nations Food and Agriculture Organization has acknowledged that overfishing has disrupted the food chain and caused massive collateral damage to species like porpoises,

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[74]Id. at 47.

[75]William J. Richards and James A Bohnsack, The Caribbean Sea A Large Marine Ecosystem in Crisis in Large Marine Ecosystems, 44, 45 (Kenneth Sherman, Lewis M Alexander and Barry D. Gold eds., 1990).

[76]Id. at 51.

sea turtles and whales in a number of marine ecosystems.[77] Additionally, some fisheries that are already closely managed are nevertheless in decline, suggesting that ecosystem health issues such as habitat destruction or persistent pollution may be impacting the stocks. As the participants in this conference have recognized, making management decisions on the basis of looking only at individual constituent elements of marine ecosystems no longer represents an adequate response to the systemic problems plaguing the oceans and coastal regions today.[78]

On an international level, numerous large marine ecosystems have experienced, or appear to be entering, periods of system-wide degradation and injury to living marine resources. A partial list of these areas includes the Barents Sea, the North Sea, the Great Barrier Reef, the Gulf of Thailand, and the Yellow Sea. The problems that have been documented in all of these areas would benefit from the application of ecosystem-based research and management programs.

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[77] Plundering the Seas, N.Y. Times, Aug. 2, 1993, at A14

[78] Id., See also International Union for the Conservation of Nature ("IUCN"); Draft Guidelines For the Ecological Sustainability of Nonconsumptive and Consumptive Uses of Wild Species, May 28, 1993 at 3 (which, if adopted by the IUCN General Assembly will "provide Criteria and Requirements . . . . intended to guide policies, laws and administrative procedures [of member States] aimed at ensuring that any uses of wild species are sustainable and that the affected species and their supporting ecosystems are conserved.").

VI. PROPOSED MMPA AMENDMENT

To address these problems, prompt action is required to identify the most critical uncertainties and research needs. Because so little is known about the ecology and biological relationships of large marine ecosystems and how to take account of this uncertainty in management and protection programs, it is necessary to begin with a thorough, comprehensive review of the scope and magnitude of the problem and how it might be overcome. This is the approach recommended in this proposal. In the case of the Bering Sea, where widespread population declines have been documented, a more aggressive approach is required to build upon existing data and knowledge and, as soon as possible, undertake meaningful ecosystem-based resource management and marine mammal and seabird protection programs. In the past, undertaking such effort has been frustrated because several different agencies with conflicting objectives and responsibilities were involved. To circumvent these problems, a Congressional mandate to pursue these initiatives through an independent, objective review body is required.

The approach called for in this proposal is intended to identify and prevent ecosystem-wide injury before it reaches a crisis stage. As a case in point, the recently released Report of the Forest Ecosystem Management Assessment Team addressing the ecological, economic and social issues arising

under the northern spotted owl controversy, points to the need to use an ecosystem-based management program to reverse the many wildlife species problems occurring throughout the Pacific Northwest. In that context, the crisis has already taken hold, with several wildlife species and vital economic interests that depend upon natural resource utilization in jeopardy. With foresight in research and management, it should be possible to avert these problems before they occur in the Bering Sea and other large marine ecosystems. If ecosystem-based research, management, and protection initiatives are not initiated soon for the marine environment, in general, and the Bering Sea, in particular, the northern spotted owl crisis in the old growth forests of the Pacific Northwest may soon be accompanied by an equally severe crisis on the high seas off the coast of Alaska or elsewhere.

For purposes of carrying out the proposal described in this report, the following amendment to the MMPA is requested:

Amend section 110 of the MMPA by adding new subsections (b) and (c) to read as follows:

(b)(1) The Secretaries of Commerce and the Interior, in consultation with the Marine Mammal Commission, shall within 60 days of enactment contract with the National Academy of Sciences for an independent assessment of natural and anthropogenic factors affecting the health and stability of

marine ecosystems of which marine mammals are a part, and measures necessary to restore and maintain those large ecosystems and their key components (particularly those in whole or in part under United States jurisdiction or subject to United States obligations under international agreement) in the state which will:

(A) ensure the fullest possible range of management options for future generations;

(B) allow the sustainable consumptive and non-consumptive uses of renewable resources;

(C) permit non-wasteful, environmentally sound development of non-renewable resources; and

(D) ensure and protect the continued availability of marine mammals and other living marine resources for subsistence and handicraft purposes by Aleuts, Eskimos and Indians who dwell on the coast of the North Pacific Ocean or the Arctic Ocean.

(2) The report of the study required by this section shall include:

(A) definitions of "large marine ecosystem" and "key ecosystem components" that would be useful

for long-term conservation and management purposes as defined in § 3(2) of this Act;

(B) a description of the areas that meet the definition of "large marine ecosystem" developed under paragraph (b)(1)(A);

(C) a list and general description of the physical and biological characteristics and key biotic and abiotic components of those marine ecosystems;

(D) an inventory of available data and data sources for: (i) determining the present state of, and threats to, the key components of the large marine ecosystems identified pursuant to paragraph (b)(1)(B); and (ii) establishing the information baselines which, in conjunction with long-term monitoring programs, would be necessary to detect changes in key ecosystem components and to differentiate between changes caused by natural and anthropogenic factors;

(E) a description of, and explanation of the rationale for, actions that should be taken to improve the comparability, accessibility, and utility of existing databases and data collected in the future to assess and monitor

the state of key ecosystem components and to evaluate the effectiveness of environmental and resource conservation programs;

(F) a description of actions that would be required to identify gaps in knowledge of: (i) basic ecosystem structure and dynamics; (ii) the current status of, and the numerical and functional relationships among, key ecosystem components; (iii) how key ecosystem components have been and are being affected, directly and indirectly, by human activities; and (iv) how the key ecosystem components might respond to alternative management strategies;

(G) recommendations for research and monitoring programs necessary to fill the identified critical data gaps, establish adequate baselines, and detect and be able to determine the probable cause or causes of changes in key ecosystem components;

(H) establishment of a process to utilize Alaska Native organizations and traditional Native local knowledge to conduct research into the environmental factors, population dynamics and ecological relationships that control, or

structure, such ecosystems, or affect the use of components of such ecosystems for subsistence purposes; and

(I) such other information, analyses, or recommendations as the Academy believes necessary to provide for environmentally sound conservation and management of marine ecosystems and their component parts.

(3) The Secretaries shall request that the National Academy of Sciences submit a final report containing the results of its review to the Secretaries not later than 24 months after enactment. The Secretaries shall transmit copies of the report to the Senate Committee on Commerce, Science, and Transportation and the House Committee on Merchant Marine and Fisheries, together with such comments as the Secretaries and the Marine Mammal Commission deem appropriate, not later than 90 days after it is submitted by the National Academy of Sciences.

(4) Of the funds authorized to be appropriated to the Secretary by this section, such amounts as are required shall be available to carry out this subsection.

(c)(1) The Secretaries of Commerce and the Interior, in consultation with the Marine Mammal Commission, shall, commencing within 180 days of enactment, undertake a long-term

scientific research program to monitor and promote the health and stability of Bering Sea marine ecosystem and to fill data gaps and resolve uncertainties concerning the causes of, and necessary actions to reverse, population declines of marine mammals, marine birds, and fish stocks of that region. Such program shall address, but be need not be limited to, the research recommendations that will be included in the report to be issued in 1994 by the National Academy of Sciences, under contract with the Department of State, on the Scientific and Technical Understanding of the Bering Sea Ecosystem. The long-term program established under this section shall include research on subsistence uses of the biological resources of the Bering Sea by Alaska Natives and how to best provide for the continued opportunity for such uses.

(2) To the maximum extent practicable, the research program undertaken pursuant to paragraph (c)(1) shall be conducted in Alaska at a location or locations where researchers will have access to the ecosystem studied, and where the environmental systems and biotic and abiotic factors can be monitored. As part of this process, when carrying out research pursuant to paragraph (c)(1) of this section, the Secretary shall, upon the request of a qualified Alaska Native organization, contract with that organization to conduct such research pertaining to the use of marine ecosystem resources for subsistence purposes. Research facilities used pursuant

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to this subsection shall be made available to the U.S. Fish and Wildlife Service for interpretation and visitor service purposes in connection with units of the National Wildlife Refuge System in Alaska. The facilities shall be used as a repository and clearinghouse for studies, research data, abstracts and other information pertinent to the health and stability of the Bering Sea. As deemed necessary and appropriate, either the Secretary of the Interior or the Secretary of Commerce shall establish additional research support facilities in the Bering Sea region.

(3) The Secretaries of Commerce and the Interior and the Commission shall specifically address the status and findings of such research program in their respective annual reports to Congress as required by sections 103(f) and 204 of this Act.

(4) Of the funds authorized to be appropriated to the Secretary by this section, such amounts as are required shall be available to carry out this subsection.

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